Supreme Court, U.S.

97 • 375 SEP 2 1997

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

WALTER GALE STEINHORST,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

By: STEPHEN D. ALEXANDER
Counsel of Record
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
350 South Grand Street
Los Angeles, California 90071
(213) 473-2000

Of counsel:
WILLIAM A. MOLINSKI
JENNIFER L. COLYER
DAVID R. BOYKO

39 pp

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether one of the most basic fair trial rights granted by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the right to an unbiased and impartial judge, may be unintentionally waived by a criminal defendant, when the defendant is facing a death sentence and is unaware of the facts underlying the waiver?

2. Whether the State may impose an affirmative burden upon Petitioner or his counsel to investigate the background of the Judge who presided over Petitioner's state law collateral attack on his conviction to discover grounds for recusal when (a) Petitioner had no reason to suspect that cause for recusal existed; (b) the Judge failed to properly recuse himself from the case, having previously represented the estate of one of the victims; and (c) the State knew about and failed to disclose the conflict?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

JURISDICTION 1

CITATIONS OF OPINIONS ENTERED IN THIS MATTER 1

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

- Background 3
- Involvement By Judge Turner 4
- The Discovery of Judge Turner's Inherent Conflict of Interest 7
- Petitioner's Claim of a Due Process Violation 8

REASONS FOR GRANTING THE WRIT 17

I. The Alleged Waiver did not Comport with Due Process 17

II. This Court Should Decide How the Due Process Clause Limits a State from Using Procedural Bars to Deprive a Petitioner Under a Death Sentence from having His State Post-Conviction Proceeding Heard Before an Unbiased Judge 23

A. The Automatic Reversal Rule for Fundamental Due Process Violations Should Apply to State Decisions as Well 23

B. The State Should Bear the Burden When the Issue is Denial of a Fundamental Right to Due Process 27

CONCLUSION 29

TABLE OF AUTHORITIES

Cases

Aetna Life In. Co. v. Lavoie, 475 U.S. 813 (1986)..... 18

American Construction Co. v. Jacksonville, Tampa and Key West Railway Co., 148 U.S. 372 (1893) 23

Bonavista Condo Assoc. Inc. v. Bystom, 520 So. 2d 84 (Fla. Dist. Ct. App. 1988), *superceded by statute on other grounds, Brazilian Court Hotel Condo, Owner Assoc. v. Walker*, 584 So. 2d 209 (Fla Dist. Ct. App. 1991)..... 12

Bracy v. Gramley, 117 S. Ct. 1793 (1997) 17, 22

Caldwell v. Mississippi, 472 U.S. 320 (1985)..... 12

Chapman v. California, 386 U.S. 16 (1967) 27

Ciak v. United States, 59 F.3d 296 (2d Cir. 1995)..... 24

Cooper v. Oklahoma, 116 S. Ct. 1373 (1996)..... 21, 28

County Court of Ulster County, New York v. Allen, 442 U.S. 140 (1979)..... 13

Cox v. Norris, 958 F. Supp. 411 (E.D. Ark. 1996)..... 24

Cuyler v. Sullivan, 446 U.S. 335 (1980) 24, 25

Daye v. Attorney Gen. of State of New York, 696 F.2d 186 (2d Cir. 1982), *cert. denied*, 464 U.S. 1084 (1984)..... 18

Dobbs v. Zant, 506 U.S. 362 (1973)..... 27

Dyas v. Lockhart, 705 F.2d 993 (8th Cir. 1983), *cert. denied*, 464 U.S. 982 (1983) 20

Dyas v. Lockhart, 771 F.2d 1144 (8th Cir. 1985) ...17, 19, 20

Haines v. Liggett Group Inc., 975 F.2d 81 (3d Cir. 1992) . 19

Harris v. State, 438 So. 2d 787 (Fla. 1983), *cert. denied*, 493 U.S. 1011 (1989) 22

Hill v. State, 473 So. 2d 1253 (Fla. 1985) 12

Hitchcock v. Dugger, 481 U.S. 393 (1987) 7

Hummel v. Heckler, 736 F.2d 91 (3d Cir. 1984) 18

In re Murchison, 349 U.S. 133 (1955) 8, 11, 17, 19

In re Turner, 421 So. 2d 1077 (Fla. 1982) 8

Jenkins v. Sterlacci, 849 F.2d 627 (D.C. Cir. 1988) 19

Johnson v. Mississippi, 403 U.S. 212, 215 (1971) 10

Johnson v. Zerbst, 304 U.S. 458 (1938) 20

Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989) 16

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) 10

Los v. Los, 595 A.2d 381 (Del. 1991) 19

Mayberry v. Pennsylvania, 400 U.S. 455 (1971) 1, 10

Michigan v. Long, 463 U.S. 1032 (1983) 12

Moore v. Michigan, 355 U.S. 155 (1957) 18

O'Neal v. McAninch, 513 U.S. 432 (1995) 28

Offutt v. United States, 348 U.S. 11 (1954)..... 19

Patterson v. New York, 432 U.S. 197 (1977)..... 21

Peede v. State, 474 So. 2d 808 (Fla. 1985), *cert. denied*, 474 U.S. 909 (1986)..... 22

Pennoyer v. Neff, 95 U.S. 714 (1878) 8, 11

Pennsylvania v. Muniz, 496 U.S. 582 (1990) 12

Peters v. Kiff, 407 U.S. 493 (1972) 19

Rose v. Clark, 478 U.S. 570 (1986)..... 28

Sandstrom v. Butterworth, 738 F.2d 1200 (11th Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985)..... 10

Scull v. State, 569 So. 2d 1251 (Fla. 1990)..... 11

Selsor v. Kaiser, 81 F.3d 1492 (10th Cir. 1996)..... 24

State v. Griffith, 561 So. 2d 528 (Fla. 1990) 22

State v. Olmstead, 261 N.W. 2d 880 (N.D. 1978), *cert. denied*, 436 U.S. 918 (1978) 19

Steinhorst v. State, 636 So. 2d 498 (Fla. 1994)..... 12

Steinhorst v. State, 574 So. 2d 1075 (Fla. 1991) 7

Steinhorst v. State, 498 So. 2d 41 (Fla. 1986) 6

The Florida Canners Assoc. v. State of Fla. Dept. Of Citrus, 371 So. 2d 503 (Fla. Dist. Ct. App. 1979), *aff'd. sub nom, The Coca-Cola Co., Food Div., Polk Cty., Fla. v. State of Fla. Dept. of Citrus*, 406 So. 2d 1079 (Fla. 1981) 12

Tumey v. Ohio, 273 U.S. 510 (1927) ..... *passim*

United States v. Agurs, 427 U.S. 97 (1976) 24, 25

United States v. Fish, 34 F.3d 488 (7th Cir. 1994) 24

United States v. Levy, 25 F.3d 146 (2d Cir. 1994) 24

United States v. Olano, 507 U.S. 725 (1993) 28

United States v. Wade, 931 F.2d 300 (5th Cir. 1991), *cert. denied*, 502 U.S. 888 (1991) 17

Wood v. Georgia, 450 U.S. 261 (1981) 10, 24

Woodson v. North Carolina, 428 U.S. 280 (1976) 25

Constitutional Provisions

U.S. Const., Amend. XIV 2

Fla. Const., art. I, § 9, ... 12

Federal Statutes

28 U.S.C. § 1257 1

Other Authorities

Fla. R. Civ. P. 1.540.....8, 9, 10

Fla. R. Crim. P. 3.850..... *passim*

JURISDICTION

The Florida Supreme Court issued an opinion on June 5, 1997 (App. at 2-21.) The judgment became final and a mandate issued on July 7, 1997. (App. at 1.) This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CITATIONS OF OPINIONS ENTERED IN THIS MATTER

Following is a list of all reported decisions in connection with Petitioner's case, in descending order.

Steinhorst v State, 695 So 2d 1245 (Fla. 1997)
Steinhorst v. Singletary, 638 So. 2d 33 (Fla. 1994)
Steinhorst v. State, 636 So. 2d 498 (Fla. 1994)
Steinhorst v. State, 574 So. 2d 1075 (Fla. 1991)
Steinhorst v. State, 498 So. 2d 414 (Fla. 1986)
Steinhorst v. Wainwright, 477 So. 2d 537 (Fla. 1985)
Steinhorst v. State, 438 So. 2d 992 (Fla. App. 1983)
Steinhorst v. State, 412 So. 2d 332 (Fla. 1982)

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Mr. Steinhorst's appellate counsel moved both the Circuit Court of Florida and the Florida Supreme Court to void the post-trial judgment at issue here under the Due Process Clause, citing this Court's well-established rulings that trial by an impartial tribunal is a fundamental right of due process. *See Mayberry v. Pennsylvania*, 400 U.S. 455, 464-65 (1971); *Tumey v. Ohio*, 273 U.S. 510, 522 (1927). (App. at 164-72.) When first raised with the Circuit Court, that court disregarded any due process implications by applying a state criminal statute that would prevent a defendant from raising judicial bias if not brought at the time of his initial post-conviction appeal. The Florida Supreme Court, by order dated April 21, 1994, while recognizing that the failure to ensure that Petitioner's post conviction motion was heard by an impartial judge raised serious due process concerns, decided to instead look to state

statutes that precluded a defendant from raising recusal unless he neither knew of the conflict nor could have discovered its existence by the exercise of due diligence. The Florida Supreme Court entered final judgment on June 5, 1997 when it determined that Petitioner had failed to meet the standard imposed by court to exercise due diligence in discovering this Judge's partiality. A mandate issued on July 7, 1997.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution and Florida Rules of Civil Procedure 1.540(h) and 3.850, which are set forth on pages 204-06 of the Appendix.

STATEMENT OF THE CASE

Unbeknownst to Petitioner, the same Florida trial judge who had summarily denied his motion for post-conviction relief and, on remand, again denied the same motion, had previously served as a lawyer for the estate one of the victims and who had, unbeknownst to Petitioner, recused himself from a co-defendant's collateral proceeding. Despite this clear appearance of judicial bias, the Florida Supreme Court, in a 5-4 decision, denied Petitioner's request for a hearing before a fair and unbiased judge.

The Florida Supreme Court's majority opinions in both the initial appeal by Petitioner in which he raised the issue of judicial partiality, and in the final and most recent appeal, completely ignore the obvious effect of their rulings on Petitioner's fundamental due process rights. Instead, the Florida Supreme Court bases its ruling on a state statute that would prevent Petitioner from being provided an unbiased judge if the fact of the prior judge's bias "could have been ascertained by the exercise of due diligence." (App. at 138.)

The Florida Supreme Court imposed this standard even though it concluded that the potential conflict by the trial judge was so severe as to cause the judge to recuse himself from the trial of one Petitioner's co-defendants, and yet

he failed to recuse himself from Petitioner's case or even to notify Petitioner of the potential conflict, "even though the reasons for recusal applied equally to both cases." *Id.* Moreover, the Florida Supreme Court then applied this standard in a way that would require Herculean efforts by Petitioner's counsel to discover the existence of the recusal order in a co-defendant's case – a document that they did not know existed and had no reason to believe existed. As one of the Florida Supreme Court dissenters noted, discovering the judicial conflict would be like finding "a needle in a haystack." (App. at 19.) This case presents an opportunity for this Court to correct a blatant miscarriage of justice by determining that the right to an unbiased judge cannot be circumscribed by state procedural rules that impose unwarranted and unjustified conditions on an individual's right to an impartial tribunal – one of most basic rights guaranteed by due process.

Background

In Panama City, Florida, on November 30, 1977, Petitioner Walter Gale Steinhorst ("Petitioner"), along with two other individuals, David Goodwin and Charlie Hughes, were indicted on three counts of murder. Petitioner alone was indicted on a fourth count of murder. The three cases were severed.

Petitioner's trial was held in April and May of 1978 before then-Florida Supreme Court Justice James C. Adkins, sitting by designation. The evidence presented at trial placed all three defendants at the scene of the murders, but no physical evidence was presented to link any of the defendants to the murders. Instead, the State presented circumstantial evidence and immunized testimony in its attempt to prove that the defendants were the murderers.

Petitioner was convicted on all four counts of murder, although the jury did not specify whether the verdicts were based on a finding of felony murder or pre-meditated murder. Petitioner was sentenced to death on the first three counts and was sentenced to life imprisonment on the fourth.

Defendant Goodwin was tried several weeks later and was also originally sentenced to death for three counts of murder.[1] Defendant Hughes, who remained a fugitive from the law until 1981, was also convicted of three counts of murder, but was sentenced to only thirty years in prison, of which he ultimately served less than five years. There was no rational reason for the vastly divergent lengths of the three defendant's sentences, and, in fact, Judge Adkins later testified that the evidence at the trials of both Petitioner and defendant Goodwin indicated that all three defendants were equally guilty. Judge Adkins further testified that his feeling was "that, more likely than not, David Goodwin killed the people" but that "Charlie Hughes, who, from the evidence presented, struck me as a real bad egg."[2]

In reference to Petitioner's obviously disproportionate sentence of death, Judge Adkins concluded by stating "I simply do not believe that the criminal justice system ought to work this way . . . I believe this situation ought to be rectified. I am not in a position to correct this disproportionate situation . . . I hope that somebody will do something about this. I wish I could."

Involvement By Judge W. Fred Turner

On February 13, 1986, Petitioner filed a motion for post-conviction relief in the Circuit Court of Florida pursuant to Florida Rule of Criminal Procedure 3.850. Normally a 3.850 motion would have been heard before Judge

---

1 The Supreme Court later overturned Mr. Goodwin's death sentence. *Goodwin v. State*, 405 So. 2d 170 (1981).

2 Judge Adkins' testimony was presented in an affidavit submitted as an exhibit to Petitioner's post conviction motion.

Adkins, the trial judge,[3] but since Judge Adkins had become a sitting Florida Supreme Court Justice, Petitioner's 3.850 motion was assigned to Judge W. Fred Turner, whose later discovered conflict of interest is the subject of this Petition.

Judge Turner summarily denied the 3.850 motion without hearing on March 24, 1986. It was later established

---

3 This fact is significant. Judge Adkins later testified about Petitioner's trial and the reasons why the case "left a bad taste in [his] mouth." (Adkins Aff. ¶ 6.) One problem Judge Adkins had was that he found it "extremely suspicious" that the victims had just "happened upon the drug operation" as claimed by the State, particularly given the remote location and time of night. (*Id.* ¶ 7.) Judge Adkins felt that the Petitioner was mischaracterized as a "hard man" and that the defense had failed to present witnesses, such as family members, to testify as to his true nature. (*Id.* ¶ 8.)

The issues raised by Judge Adkins are the very same issues Petitioner sought to present in the post conviction motion before Judge Turner that Judge Turner denied without ever having read the trial transcript. For example, Petitioner argued that the State had failed to turn over dozens of witness interview to Petitioner that would have supported the theory, *inter alia*, that the victims did not "happen upon" the drug operation but were at that location for the express purpose of attempting to steal the drugs being imported. *See Brady v. Maryland*, 373 U.S. 83 (1963) (suppression of favorable evidence by the prosecution violates due process where evidence is material to guilt or sentencing). Further, Petitioner argued that he was prevented from offering into evidence nonstatutory mitigating evidence during the sentencing phrase of trial. Had he been permitted to do so, Petitioner could have and would have offered numerous witnesses, including several family members to testify about the strength of Petitioner's background and character.

that Judge Turner had never even seen the trial record before rendering his decision. (App. at 186.) Moreover, Judge Turner failed to provide Petitioner with notice of his denial of this motion, and, in fact, Petitioner did not learn of the decision until over seven months later, when Petitioner's counsel noticed a press release stating that the Governor of Florida had issued a warrant for Petitioner's execution.

Upon learning of the death warrant, on November 14, 1986, Petitioner requested a stay of execution and filed a motion with Judge Turner to vacate his order of March 24, 1986. On November 20, 1986, Judge Turner granted the request to vacate his prior order but simultaneously denied for a second time the motion for post-conviction relief. Again, Judge Turner denied the motion without examination of or access to the trial record and without conducting a hearing, let alone an evidentiary hearing, as required by Rule 3.850.

On November 21, 1986, Petitioner appealed Judge Turner's denial to the Florida Supreme Court and requested a stay of execution. On November 26, 1986, the Florida Supreme Court granted Petitioner's request for a stay of execution.[4] The Supreme Court also vacated Judge Turner's order and remanded the case for an evidentiary hearing. Specifically, the Florida Supreme Court ruled that Petitioner had presented sufficient evidence of error at his criminal trial to require an examination of the record and an evidentiary hearing. Judge Turner had therefore erred in failing to review the record or hold such a hearing.

At the insistence of the Florida Supreme Court, Judge Turner held an evidentiary hearing on Petitioner's post-conviction motion from September 16-18, 1987. (App. at 22-135.) On June 23, 1988, however, Judge Turner denied the motion for a third time. It was later discovered, and Judge

---

4 *Steinhorst v. State*, 498 So. 2d 414 (Fla. 1986).

Turner admitted, that his decision was again made without his gaining access to the trial record.

On July 5, 1988, Petitioner filed a notice of appeal from the Circuit Court's denial of relief. On March 6, 1991, the Florida Supreme Court affirmed the Circuit Court.[5]

The Discovery of Judge Turner's Inherent Conflict of Interest

After all avenues of appeal in the state courts appeared to be exhausted, counsel for Petitioner[6] began to review the court files in connection Petitioner's federal habeas corpus proceedings. What counsel found was shocking. Buried in this file on a single sheet simply entitled "Order" was an order dated July 9, 1981, from Judge Turner, recusing himself from presiding over the trial of Petitioner's co-defendant Charlie Hughes on the grounds that he had previously represented the estate of one of the murder victims.

---

5 *Steinhorst v. State*, 574 So. 2d 1075 (Fla. 1991). The dissent argued that there was *Hitchcock* error at the penalty phase. *Hitchcock v. Dugger*, 481 U.S. 393, 2d 347 (1987):

> The record before us discloses substantial mitigating evidence improperly excluded from Steinhorst's trial . . . For these reasons, I believe there is no question that the federal courts under their own precedent must grant relief if this Court fails to do so. No good reason exists to delay such relief any longer.

Id. at 1078

6 Petitioner has been represented since 1981 by the law firm of Fried, Frank, Harris, Shriver & Jacobson, which has served as pro bono counsel to Petitioner following Petitioner's direct appeal from his conviction.

Judge Turner had represented the Estate of Harold Sims. Petitioner was convicted of killing Mr. Sims. These facts alone create an obvious appearance of impropriety and bias. Moreover, one of the assets of the estate described by then-attorney Turner was a wrongful death claim, suggesting Judge Turner had preconceived notions of the facts and circumstances surrounding the murder.[7] (App. at 14.)

Petitioner's counsel located this recusal order in September, 1991, and on October 4, 1991, immediately appealed to the Circuit Court for relief from judgment pursuant to Florida Rule of Civil Procedure 1.540(h)(4) seeking to have Judge Turner's judgment declared null and void. (App. at 184-202.) Petitioner argued that Fla. R. Civ. P. 1.540 was the applicable vehicle for raising this previously undisclosed conflict. Under Rule 1.540 a motion is timely if made within a "reasonable time" of discovering the conflict. Having brought his motion within two weeks of discovering the recusal order, clearly Petitioner had met this requirement.

Petitioner's Claim of a Due Process Violation

Regardless of the vehicle used to raise this issue, however, Petitioner argued that the fundamental principles of due process required that Judge Turner's judgment be declared void. Citing cases such as *Pennoyer v. Neff*, 95 U.S. 714 (1877); *In re Murchison*, 349 U.S. 133 (1955) and *Tumey v. Ohio*, 273 U.S. 510, 522 (1927), Petitioner argued that even if another statutory vehicle was determined to be appropriate for raising this issue, that statute would be limited to the extent that

---

7 Judge Turner's failure to recuse himself in this case was not his first deviation from judicial protocol. *See In re Turner*, 421 So. 2d 1077 (Fla. 1982) (Judge Turner's conduct in several cases subject to public reprimand as having brought the judiciary into disrepute).

it conflicted with Petitioner's right to an impartial tribunal under the Due Process clause of the Fourteenth Amendment. (App. at 198-200.)

On February 12, 1993, the Circuit Court entered a preliminary order requiring the State to respond to the Rule 1.540 petition within 30 days and the petitioner "shall likewise have thirty days from service of the State's response to respond." Despite this order, however, on April 12, 1993 -- two days before Petitioner's reply was due to be filed[8] -- the Circuit Court denied the motion without a hearing. (App. at 181-83.)

The Circuit Court based its ruling on its belief that Fla. R. Crim. P. 3.850 applied rather than Fla. R. Civ. P. 1.540. According to the Circuit Court, under Rule 3.850, Petitioner's motion was not timely. The Circuit Court further ruled that the judgment was not void and was not subject to collateral attack. (App. at 182.) The court ignored entirely the issue of Petitioner's fundamental right to an impartial tribunal and the effect of its ruling on Petitioner's due process rights under the United States Constitution.

On April 24, 1993 Petitioner filed a motion for rehearing, which was granted by the Circuit Court on July 8, 1993. At the same time, however, the Circuit Court denied the Rule 1.540 motion. Again the Circuit Court bypassed the due process concerns raised by Petitioner, instead relying on Fla. R. Crim. P. 3.850 and its statutory time bar.

On August 2, 1993, Petitioner appealed this decision to the Florida Supreme Court. (App. at 141-80.) Petitioner argued that the Circuit Court erred in holding that Rule 3.850, and not Rule 1.540, was the appropriate procedure

---

[8] The State served its opposition on Petitioner's counsel on March 15, 1993. Petitioner's reply was therefore due on April 14, 1993.

for reopening the judgment due to the undisclosed conflict. Moreover, again Petitioner argued that the judgment by Judge Turner was void because it failed to comport with fundamental due process. (App. at 164-72.)

Petitioner's appellate counsel moved the Florida Supreme Court to void the post-trial judgment at issue here under the Due Process Clause, citing this Court's well-established doctrine that trial by an impartial tribunal is a fundamental right of due process.[9] *See, e.g., Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988) (referring to issue of judicial bias, "the United States Supreme Court has dealt with precisely this issue in a case on point"); *Johnson v. Mississippi*, 403 U.S. 212, 215 (1971) (due process requires that criminal defendant's case be heard by an impartial judge); *Mayberry v. Pennsylvania*, 400 U.S. 455, 464-65 (1971) (disregard for the appearance of impartiality is a due process violation which voids a judgment of contempt); *In re Murchison*, 349 U.S. 133, 136 (1955) (A fair trial in a fair tribunal is a basic requirement of due process); *Tumey v. Ohio*, 273 U.S. 510, 522 (1927) (to subject a defendant to trial in a criminal case involving his liberty or property before judge having a direct, personal, substantial interest in convicting him is a denial of due process of law); *Pennoyer v. Neff*, 95 U.S. 714 (1878) (same); *Sandstrom v. Butterworth*, 738 F.2d 1200 (11th Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985) (acknowledging fundamental due process right to impartial tribunal and affirming district court's order granting habeas corpus petition

---

9 This Court may exercise jurisdiction over due process issues which are apparent on the face of the record and which constitute a basic, fundamental unfairness in the proceedings below. *Wood v. Georgia*, 450 U.S. 261, 264-65, and n.5 (1981). Clearly, such issues are apparent on this record.

due to trial judge's failure to recuse himself from determining whether petitioner was in contempt of court). (App. at 164-72.)

On April 21, 1994, the Florida Supreme Court issued its ruling on Petitioner's appeal. The Florida Supreme Court agreed with the State that Fla. R. Civ. P. 1.540 was not applicable, but ruled that the Circuit Court should have treated the motion as a Rule 3.850 motion. (App. at 136-40.)

In its opinion, the Florida Supreme Court recognized the grave impropriety of Judge Turner's having presided over Petitioner's post conviction proceeding, noting:

> Judge Turner recognized the potential for serious conflict and entered an order of recusal in the trial of one of Steinhorst's co-Defendants. No such recusal was ordered here, nor did the judge notify the parties of the potential conflict, even though the reasons for recusal applied equally to both cases.

(App. at 137-38.)

The court also recognized the serious due process concerns raised by this conflict:

> Moreover, such evidence would present grave due process concerns. A judge who is recused from a codefendant's case also must be recused from another codefendant's case if the reasons for recusal apply equally to both. There is no other conclusion that is consistent with one of the most important dictates of due process: that *proceedings involving criminal charges, and especially the death penalty, must both be and appear to be fundamentally fair*. As this Court has noted in *Scull v. State*, 569 So. 2d 1251, 1252 (Fla. 1990):
>
> One of the most basic tenets of Florida law is the requirement that all proceedings affecting life, liberty, or property must be conducted according to due process. Art. I, § 9, Fla. Const.... "[D]ue process" embodies a

> fundamental conception of fairness that derives ultimately from the natural rights of all individuals. See art. I, § 9, Fla. Const."[10]

(App. at 138-39.)

Despite the Florida Supreme Court's express recognition that Judge Turner's conflict impacted Petitioner's

---

10 The fact that the Florida Supreme Court relied upon the Florida Constitution, and not the United States Constitution, does not defeat jurisdiction. It is clear that Petitioner urged the Court to reject Judge Turner's ruling based upon both the Florida and United States Constitutions, citing both federal and state case law in support of his position. Moreover, where the state court decision appears to be interwoven with federal law and the independence of any state law ground is unclear from the face of the opinion, then jurisdiction is not defeated. *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985) (*citing Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983)). Such interweaving can occur where a state constitution is the basis for a decision, but the state court treats the both constitutions as equivalents. *Pennsylvania v. Muniz*, 496 U.S. 582 n.5 (1990).

That interweaving is the case here. Though the Florida Supreme Court appeared to rely on the state, rather than the federal, constitution, Florida law equates the state constitutional protections for due process to those guaranteed under the federal constitution. *Hill v. State*, 473 So. 2d 1253, 1256, 1258-59 (Fla. 1985), *Bonavista Condo. Assoc., Inc. v. Bystrom*, 520 So. 2d 84, 86 (Fla. Dist. Ct. App. 1988), *superseded by statute on other grounds*, *Brazilian Court Hotel Condo. Owner Assoc. v. Walker*, 584 So. 2d 609 (Fla. Dist. Ct. App. 1991); *The Florida Canners Assoc. v. State of Fla. Dept. Of Citrus*, 371 So. 2d 503, 513 (Fla. Dist. Ct. App. 1979), *aff'd. sub nom*, *The Coca-Cola Co., Food Div., Polk Cty., Fla. v. State of Fla., Dept. Of Citrus*, 406 So. 2d 1079 (Fla. 1981).

due process rights, the Court did not immediately void Judge Turner's order. Instead, the court ruled that under Fla. R. Crim. P. 3.850, Petitioner's claim would be deemed waived if the "facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence."[11] Fla. R. Crim. P. 3.850 (b)(1). (App. at 139.) As a result, the court remanded the case for a factual determination of whether Petitioner knew, or could have known by the exercise of due diligence, about the recusal order.

On October 13, 1994 an evidentiary hearing was held before the Circuit Court on the issue remanded to it by the Florida Supreme Court. (App. at 22-137.) Without conceding that the standard now being imposed by the Florida Supreme Court complied with Petitioner's due process rights, Petitioner argued that he neither knew, nor could have known by the exercise of due diligence, about Judge Turner's conflict. Petitioner presented evidence showing that Judge Turner had never notified Petitioner or Petitioner's counsel of the grounds for his recusal in Hughes' case or even of the fact that he had recused himself. (App. at 207-08.) The State, through the prosecuting attorney, conceded that it was aware of the recusal yet made no attempt to notify Petitioner of it.

Moreover, Petitioner argued that the recusal order was never made available to Petitioner's counsel. Petitioner presented evidence that Petitioner's counsel had

---

11 Although not expressly addressed by the Florida Supreme Court in both of its two recent decisions in this matter, Petitioner's reliance on those cases which expressly addressed the Due Process Clause under the United States Constitution is sufficient to establish that the federal question was raised below. *County Court of Ulster County, New York v. Allen*, 442 U.S. 140 n.5 (1979).

diligently reviewed the files made available to them at the Bay County Courthouse, but that the recusal order was not present in those files, which were given to Petitioner's defense team for review. The State's own witnesses acknowledged that the files were "a mess," that portions of the files of the various co-defendants were kept in different places, and that the clerks who were providing Petitioner's counsel with the files did not have access to all of the files. (App. at 104.) The State also acknowledged that the order did not appear on a docket sheet, as there was no docket sheet. (App. at 108.)

All of this evidence supported Petitioner's own witnesses' statements that the recusal order from co-defendant Hughes' file was not made available to Petitioner or his counsel in their initial review of the file in 1986 and in fact, was not made available to Petitioner until 1991 after the files were consolidated and reorganized.[12] Despite Petitioner's counsel's repeated requests prior to 1991 for all of the files, the recusal order was never provided to them. No amount of due diligence, argued Petitioner, could have uncovered what was not there and what Petitioner's counsel had no reason to believe existed in the first place.

On June 19, 1995, the Circuit Court issued an Order Denying Rehearing after Evidentiary Hearing. (App. at 207-10). The Court found that neither Petitioner nor his counsel knew of Judge Turner's recusal from the Hughes case, and that it was "clear that Judge Turner did not advise them of this fact." (App. at 207-08.) The Court found, however, that the recusal order was not misplaced and that no one from the

---

12 Petitioner also presented evidence to show that Petitioner's counsel diligently attempted to contact co-defendant Hughes' counsel to discuss the case in an effort to determine if additional grounds for appeal existed, but that Hughes' counsel refused to cooperate. (App. at 32, 46-47.)

clerk's office had attempted to "conceal or hide it from Petitioner's counsel." (App. at 208.) Unbelievably, in the face of testimony from the court clerks that the files were a "mess" and were kept by piling papers in unmarked boxes, the Circuit Court blithely found that "[t]he contents of the files were there for them to review" and denied Petitioner's motion to set aside Judge Turner's judgment. (App. at 208-10.)

On July 17, 1995, Petitioner appealed this judgment to the Florida Supreme Court. Petitioner argued that the Circuit Court's factual findings were clearly erroneous and that the Circuit Court failed to properly apply the standard of "due diligence" set by the Florida Supreme Court, instead requiring an "extreme" diligence standard by requiring counsel to find something that it did not even know existed and could not be found.

In a 5-4 decision issued on June 5, 1997, the Florida Supreme Court denied Petitioner's appeal. (App. at 2-21.) The Court found that the evidence supported two conflicting theories on whether the recusal order could have been located with due diligence. (App. at 7.) By reviewing the record in the light most favorable to the "prevailing theory", the Court upheld the factual findings of the Circuit Court that Petitioner's counsel failed to exercise due diligence in locating the recusal order. *Id.*

The dissent by Justice Kogan attacked the majority decision for failing to address the serious due process concerns implicated by the Circuit Court's decision. (App. at 9-13.) According to the dissent, the majority's decision assumes, as its prior decision had, that Petitioner's due process rights could be waived, and more importantly, that those rights could be waived unknowingly and unintentionally without Petitioner's participation. Justice Kogan wrote:

> As I indicated in my prior opinion, I believe that Steinhorst's particular due process claim is nonwaivable under any construction of the facts. To hold otherwise casts upon the defendant an affirmative duty to investigate a judge's background for the possible sources of

> conflict. *See Lightbourne v. Dugger*, 549 So. 2d 1364, 1368 (Fla. 1989) (Barkett, J., concurring in part, dissenting in part). To impose such a duty is inconsistent with the dictates of our Constitution which, as the majority previously recognized, requires that proceedings involving criminal charges, especially the death penalty, must both be and appear to be fundamentally fair. Accordingly, I cannot agree that Steinhorst waived his claim that Judge Turner's undisclosed conflict of interest required a new 3.850 proceeding before a new and impartial judge.

(App. at 12-13.)

The nature of the conflict of interest, added by Justice Anstead in a second dissent, "fundamentally undermines the fairness of those death penalty proceedings," to such an extent, that it is a "blow to our justice system." (App. at 20-21.) Because it is a fundamental requirement of due process that any waiver of the right to trial (or hearing) before an unbiased tribunal must be "knowing and intelligent," Petitioner requests that this Court issue a writ of certiorari and review this matter on the merits.

REASONS FOR GRANTING THE WRIT

I. The Alleged Waiver did not Comport with Due Process

Petitioner's so-called "waiver" of his right to have his collateral proceedings conducted before a fair and impartial judge was not "knowing and intelligent," and therefore violated basic due process guarantees under the Fourteenth Amendment. Regardless of whether Petitioner's counsel exercised due diligence in searching the court file when preparing the original Rule 3.850 petition, any waiver of the right to an impartial tribunal had to be made by Petitioner personally, knowingly and intelligently. *See Dyas v. Lockhart*, 771 F.2d 1144, 1147 (8th Cir. 1985) (waiver of judicial bias must be "knowing and intelligent" to comport with due process). It is undisputed that Petitioner, who was residing on Florida's death row at the time, did not knowingly and intelligently consent to Judge Turner's presiding over his post-conviction proceedings despite the conflict.

It is well settled that "the floor established by the Due Process Clause clearly requires a 'fair trial in a fair tribunal' . . . before a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Bracy v. Gramley*, 117 S. Ct. 1793, 1797 (1997) (citations omitted). In *Bracy*, the judge presiding over the original trial was subsequently convicted of accepting bribes to fix trials. Although there was no evidence that the judge was influenced in Bracy's trial, the Court found that the possible bias was so extreme as to trigger Fourteenth Amendment Due Process concerns. *Id. See also Tumey v. Ohio*, 273 U.S. 510, 522 (1927) ("[t]he right to a fair trial is 'a basic requirement of due process' and includes the right to an unbiased judge.") (emphasis added) (quoting *In re Murchison*, 349 U.S. 133 (1955)); *United States v. Wade*, 931 F.2d 300, 304 (5th Cir.

1991) ("Courts have repeatedly stated the importance of unbiased and unprejudiced judges."), *cert. denied*, 502 U.S. 888 (1991).[13] When a right, such as the right to an unbiased tribunal, "is of such critical importance as to be an element of due process under the Fourteenth Amendment, a finding of waiver is not lightly to be made. *Moore v. Michigan*, 355 U.S. 155, 161 (1957).

This Court's body of precedent in this area begins with *Tumey v. Ohio*, 273 U.S. 510 (1927). In *Tumey*, this Court first defined the due process standard for recusal:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between

---

13 While the majority of cases which address the issue of waiver of an impartial tribunal arise in the criminal context, the issue of judicial bias can raise constitutional concerns even in the civil context, such as post-conviction proceedings. *See, e.g., Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821 (1986) (in an insurance coverage litigation, states' decisions regarding judicial bias "not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."); *Hummel v. Heckler*, 736 F.2d 91, 93 (3d Cir. 1984) (in a disability benefit case "[i]t is, of course, axiomatic that trial before an unbiased judge is essential to due process.") (citations omitted; internal quotations omitted). Judge Turner's presiding over Mr. Steinhorst's Rule 3.850 petition after representing Sims' estate is one of "the most extreme of cases" of improper judicial bias and therefore rises to the level of a constitutional violation. *See id.*

> the state and the accused denies the latter due process of law.

Id. at 532. This Court later revisited this issue in *Murchison*, holding that "[a] fair trial in a fair tribunal is a basic requirement of due process." *Murchison*, 349 U.S. at 136; *see also Peters v. Kiff*, 407 U.S. 493, 501 (1972) (same); *Haines v. Liggett Group Inc.*, 975 F.2d 81, 98 (3d Cir. 1992) (same); *Jenkins v. Sterlacci*, 849 F.2d 627, 631 (D.C. Cir. 1988) (same); *Daye v. Attorney Gen. of New York*, 696 F.2d 186, 196 (2d Cir. 1982) ("[u]nder the Due Process Clause there is a well developed right, established in a long line of cases, to a trial before an unbiased judge"), *cert. denied*, 464 U.S. 1084 (1984); *Los v. Los*, 595 A.2d 381, 383 (Del. 1991) ("[t]he requirement that judges be impartial is a fundamental principle of the administration of justice"); *State v. Olmstead*, 261 N.W.2d 880, 884 (N.D. 1978) ("trial before an unbiased judge is essential to due process"), *cert. denied*, 436 U.S. 918 (1978).

This Court further noted in *Murchison* that "our system of law has always endeavored to prevent even the probability of unfairness." *Murchison*, 349 U.S. at 136. Thus, the Court reaffirmed the central theory behind *Tumey*, 273 U.S. at 532 and *Offutt v. United States*, 348 U.S. 11, 14 (1954) (such a stringent rule may bar judges with no actual bias); *cf. Peters*, 407 U.S. at 502 (finding a well-established rule that even absent a showing of actual bias, due process denied by circumstances creating the appearance of bias).

In *Dyas*, a case brought under the Due Process clause and not under applicable state statutory recusal law, the trial was conducted by Judge Bobby Steele, whose nephew was the prosecutor and whose wife was the court stenographer. *Dyas*, 771 F.2d at 1146. Moreover, the prosecutor's son was dating the defense attorney's daughter at the time of the trial. *Id.* Although his attorney was obviously aware of the relationships from the beginning of the trial, the defendant never discovered them until closing arguments, when his attorney said:

> Thank God I've got a friend up there on that bench that's just as good to me as he is to his own kinfolks. You know, he offered to withdraw from this case and not try it because he has a nephew as the prosecuting attorney . . . and I said "Good God, I had rather try a case in front of Judge Bobby Steel than any judge in the United States because he's going to be fair to everybody, I'll guarantee you that."

Id. at 1148. When Dyas raised a claim of judicial bias on a post-conviction collateral attack, the Eighth Circuit raised the issue of waiver and remanded the case for a finding of whether Dyas "knew about and nevertheless declined to accept Judge Steele's recusal offer." *Dyas v. Lockhart*, 705 F.2d 993, 996 (8th Cir.), *cert. denied*, 464 U.S. 982 (1983). The only evidence that Dyas knew about the recusal offer at all was the above-quoted excerpt from his attorney's closing, during which Dyas was present in the courtroom. *Dyas*, 771 F.2d at 1147. However, Dyas' silence in the face of the closing argument did not constitute a waiver of his due process right to a trial before an unbiased tribunal. Rather, the Eighth Circuit held that any waiver had to be "knowing and intelligent," concluding that

> we cannot accept the conclusion that Dyas waived his objection to Judge Steel's presence based on the information Dyas received for the first time in his counsel's closing statement . . . The district court's finding of a waiver here was clearly erroneous, particularly in light of the district court's finding that Dyas was unapprised of the relationship until the trial was over, and his finding that Dyas did not understand that he had an absolute right to require recusal.

Id. at 1147-48. In addition, the Dyas Court remarked that "[f]or Dyas to have waived his right in this fashion is a far cry from the Supreme Court's benchmark standard that a waiver is 'ordinarily an intentional relinquishment or abandonment of a known right or privilege.'" *Id.* at 1147 (quoting *Johnson v.*

Zerbst, 304 U.S. 458, 464 (1938). Thus, the Dyas Court recognized that the due process right to trial before a tribunal lacking even the appearance of bias cannot be waived by the defendant's attorney, but must be waived, knowingly and intelligently, by the defendant himself.

In the face of a possible waiver of judicial bias, rather than imposing the "knowing and intelligent" standard required by due process, the Florida Supreme Court imposed the due diligence standard required procedurally under Rule 3.850 to determine whether a movant may raise an untimely claim. However, "the State's power to regulate procedural burdens [is] subject to proscription under the Due Process Clause if it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Cooper v. Oklahoma*, 116 S. Ct. 1373, 1383 (1996) (quoting *Patterson v. New York*, 432 U.S. 197, 201-02 (1977)) Here, Florida's procedures to ensure that a defendant's due process right to a fair and impartial tribunal are woefully inadequate because the due diligence standard does not require the knowing and intelligent waiver that is the constitutional standard under *Dyas*. Instead, Florida procedure can result in the injustice in Petitioner's case: a completely unknowing waiver based upon what was in all likelihood a negligent mishandling of crucial documents by an unknown State employee.

Moreover, while applying such a harsh standard to Petitioner and his counsel, the Florida Supreme Court's decision completely relieved the two State officials who had actual knowledge of the facts -- Judge Turner and the prosecutor - from their duty to disclose the conflict and Judge Turner's prior recusal. This Court's decisions teach that the right to a fair tribunal cannot be abridged with such ease and insouciance. The Florida courts plainly erred when they failed to apply the knowing and intelligent waiver standard.

Thus, to determine whether Petitioner waived his right to bring his Rule 3.850 petition before a judge that was uninvolved, the Florida Supreme Court should have applied the standard used in *Dyas*: whether the waiver was effected by

Petitioner personally, and whether it was knowing and intelligent. The Florida Supreme Court erred when it held that Petitioner's rights were waived by failing to exercise "due diligence"; that error was of constitutional magnitude.[14]

Had the Florida Supreme Court applied the proper standard, the result – that Judge Turner's order should be voided and Petitioner's original 3.850 motion should be re-heard before an unbiased judge -- is clear. Here there is no question that Petitioner did not effect a "knowing and intelligent" waiver of his right to have his collateral proceedings conducted by an unbiased judge: Petitioner was on death row at the time and had no access to (or knowledge of) the recusal order in co-defendant Hughes' case. It is also undisputed that Petitioner's counsel did not have knowledge of the prior recusal or conflict. (App. at 4-5.) Thus counsel could not have advised Petitioner of his rights in connection

---

14 Indeed, under Florida law, in capital cases, a "knowing and intelligent" waiver by the defendant personally is required to effect a waiver of rights "which go to the very heart of the adjudicatory process." *State v. Griffith*, 561 So. 2d 528, 529 (Fla. 1990) (waiver of right to counsel and right to a jury trial must be knowing and intelligent); *see also Peede v. State*, 474 So. 2d 808, 814 (Fla. 1985) (waiver of right to attend all or part of trial must be knowing and intelligent, *cert. denied*, 474 U.S. 909 (1986); *Harris v. State*, 438 So. 2d 787, 796 (Fla. 1983) (waiver of right to include jury instruction on lesser-included offenses must be knowing and intelligent, *cert. denied*, 493 U.S. 1011 (1989)). It is difficult to imagine a right that is less central to the "heart of the adjudicatory process" than the right to a trial conducted by an impartial jurist. *See Bracy*, 117 S. Ct. at 1797. It was clear error for the Florida court to hold that Petitioner waived that right merely because there was some evidence that counsel could have found the recusal order earlier. (App. at 7.)

with any waiver. It is undisputed that Petitioner did not effect a "relinquishment or abandonment of a known right" within the meaning of *Zerbst* whether or not his counsel failed to exercise due diligence in examining the file. Other than by seeing that order, there was no reason for Petitioner to know that Judge Turner had represented Sims' estate after the murders, or to know that Judge Turner had included a wrongful death claim in his valuation of that estate. Finally, the fact that both Judge Turner and the prosecutor did not disclose the prior recusal, and Judge Turner's administration of the victim's estate, was completely outside Petitioner's knowledge and control.

II. This Court Should Decide How the Due Process Clause Limits a State from Using Procedural Bars to Deprive a Petitioner Under a Death Sentence from Having His State Post Conviction Proceeding Heard Before an Unbiased Judge

Although this Court has made clear that adjudication by a biased tribunal is a prima facie violation of fundamental due process rights, it has not set forth guidelines of how those rights may be limited procedural burdens imposed by the states. Sixth Amendment jurisprudence seems to indicate the appropriate doctrine, but an express decision from this Court is needed to implement that approach. Additionally, state law appears to lag behind the federal courts in this respect, and a decision in this case would equalize due process protections in this regard between the state and federal courts. Therefore, this Court should grant certiorari.

A. The Automatic Reversal Rule for Fundamental Due Process Violations Should Apply to State Decisions as Well

This Court held, in 1893, that a decree issuing from a court with an "interested" judge (in violation of the Judiciary Act of 1891) was unlawful and therefore void. *See American Construction Co. v. Jacksonville, Tampa and Key West Railway Co.*, 148 U.S. 372, 387 (1893). Although due process principles demand a similarly automatic reversal where

a judge with a clear conflict of interest adjudicates a capital case, this Court has not had the occasion to rule on this issue.

However, this Court has had occasion to rule on the issue with respect to the Sixth Amendment right to counsel. In *Wood v. Georgia*, this Court held that fundamental due process rights are compromised where a criminal defense is compromised by defense counsel's actual conflict of interest. *Wood,*, 450 U.S. at 273-74. Drawing on that decision, as well as *Cuyler v. Sullivan*, 446 U.S. 335 (1980), the Second Circuit Court of Appeals has held that where a court ignores a possible conflict of interest for defense counsel, the resulting decision should be automatically reversed. *United States. v. Levy*, 25 F.3d 146, 153-54 (2d Cir. 1994) (applying rule on direct appeal); *Ciak v. United States*, 59 F. 3d 296, 302 (2d Cir. 1995) (applying rule to collateral proceedings). Other federal courts have adopted that decision as well. *See Selsor v. Kaiser*, 81 F.3d 1492 (10th Cir. 1996); *United States v. Fish*, 34 F.3d 488 (7th Cir. 1994); *Cox v. Norris*, 958 F. Supp. 411 (E.D. Ark. 1996).

That approach also follows from this Court's decision in *U.S. v. Agurs*, where it drew a sharp distinction between the burdens a petitioner need bear in seeking post-trial relief based on newly-discovered evidence:

> On the one hand, the fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal [but need only show that the additional evidence creates a reasonable doubt as to guilt].

United States. v. Agurs, 427 U.S. 97, 111 (1976).

These cases derive from the state's failure to investigate and act upon counsel's potential conflict of interest, and therefore from the state's role in denying the fundamental

right to effective assistance of counsel. *See Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980). Those same principles should apply with even stronger force where it is both the judge and the prosecutor who are aware of a conflict of interest compromising the administration of justice but failed to disclose it. This can be no less offensive to due process principles than a conflict of interest suffered by defense counsel.

State courts, particularly Florida's, have not yet uniformly adopted this distinction concerning evidence newly uncovered from a neutral source versus evidence of a fundamental constitutional violation which was within the state's possession and knowledge. *See e.g.*, Fla. R. Crim. Pr. 3.850. The Florida Rule, for example, treats all claims arising from newly discovered evidence alike, without distinguishing the nature of the claim (constitutional versus technical errors) or the nature of the evidence (discovered from a neutral party or within the possession and knowledge of the state). Petitioners bringing such claims must not only produce a preponderance of evidence in their favor, but also produce a preponderance of evidence regarding whether or not the evidence could have been uncovered within two years following conviction. While this may comport with due process principles where the evidence arises from a third party, it cannot stand similarly where it is the state which has withheld the evidence and when the state should bear an affirmative burden as to its disclosure.

In essence, criminal defendants, even those under sentence of death, are subject to two burdens of proof, while the State has none and any doubts are resolved in its favor. This contradicts this Court's statement in *Agurs* that, "[i]f the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice." *Agurs, supra*, at 111; *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976).

Here, it is the State itself which was aware of its own conflict of interest yet failed to preserve Petitioner's due process rights. The burden was on the Judge to disclose the conflict and recuse himself. The burden was on the prosecutor, the State's attorney, who knew of the conflict and the prior recusal, to disclose the facts to Petitioner and his counsel. The burden was also on the State to keep its court files organized in a fashion so that the prior recusal would have been readily apparent to Petitioner.[15] That burden cannot be shifted to

---

15 The extreme unlikelihood of Petitioner's ever having located the recusal order was recognized by a dissenting opinion by the Florida Supreme Court (App. at 19-20):

> The "order" here was literally "a needle in a haystack," that we are holding voluntary collateral counsel should have found even sooner than they did. Of course, a defendant cannot ignore what is plainly there for him to see. But there was nothing here for the defendant to "plainly" see. Even under the majority's analysis, it is apparent that the State never refuted defense counsels' account of how and when they finally discovered by chance the recusal order located among papers concerning another defendant's case. In fact, the State verified the incredible mess that the court files were in. In addition, it is undisputed that the "order" in question was not specially titled to reflect its content and was not identified on any court docket, so as to alert a reader of its existence or importance. The bottom line is that these records were a mess, and that counsel exercised great diligence in actually locating something that they should have had no need to even be

Footnote continued

Petitioner who was unaware of the conflict and had no reason to even suspect that it was present. *See Dobbs v. Zant*, 506 U.S. 362 (1993). In *Dobbs*, a state prisoner under sentence of death sought to supplement the record on appeal by requiring the Court of Appeals for the Eleventh Circuit to consider the transcript of sentencing. The Court of Appeals denied the request as untimely. This Court reversed, ruling that it was error for the Court of Appeals to refuse to consider the transcript where the delay in discovering the transcript was caused by the State's own failure to transcribe the sentencing hearing.

Dobbs is on all fours with this case. Here, as in *Dobbs*, the Petitioner's due process rights should not be comprised because of a negligent error on the part of the State.

B. The State Should Bear the Burden When the Issue is a Denial of a Fundamental Right to Due Process

This Court should grant certiorari to decide whether the Due Process Clause requires the state to carry the burden of proof for procedural barriers to vindication of fundamental substantive constitutional rights in capital cases.

The seminal case of *Chapman v. California* established that adjudication by a biased judge violates fundamental constitutional rights to such a degree that the error cannot be deemed "harmless," and once a petitioner establishes such error, he is entitled to relief without further proof. *Chapman v. California*, 386 U.S. 16, 23-24 (1967). In later

---

Footnote continued from previous page

looking for anyway – something the court and the State had a moral, ethical and legal obligation to tell the defense about from the beginning.

cases, this Court has made it clear that a petitioner need only establish such fundamental error, such as a biased judge, in order to receive relief. *Rose v. Clark*, 478 U.S. 570, 577 (1986) (adjudication by biased judge requires "reversal without regard to the evidence in the particular case"); *United States. v. Olano*, 507 U.S. 725, 734-35 (1993) (criminal litigant entitled to relief under Federal Rule of Criminal Procedure 52(b) once he has satisfied the burden of proof that a prejudicial, and not a harmless, error has occurred); *O'Neal v. McAninch*, 513 U.S. 432 (1995) (federal habeas petitioner entitled to relief upon satisfying burden of proof that the trial record was merely evenly balanced as to the harmlessness or substantial and prejudicial effect of an alleged constitutional error).

Florida's requirement that Petitioner exercise "due diligence", which in this case amounted to impossible diligence, goes beyond this Court's interpretation of any burden permitted by the Due Process Clause and, to that extent, violates the Clause. As the Court noted in *O'Neal*, although the state has a valid interest in the finality of its judgments, that interest is diminished by the state's own responsibility for the error itself. *Id.* at 443. Moreover, Florida's added standard of proof does not "decrease the risk of error, but simply reallocates that risk between the parties." *Cooper v. Oklahoma*, 116 S. Ct. at 1383 (citation omitted). Such a reallocation in the face of a fundamental constitutional error, not just a technical or statutory one, is without sound basis, especially where an individual's life is at stake.

A writ of certiorari is particularly warranted on the egregious and undisputed facts of Petitioner's case and the fundamental unfairness of Florida's application of a "double" burden of proof. The Florida Supreme Court agreed that Petitioner had established Judge Turner's blatant conflict of interest and the resulting violation of his fundamental constitutional right to an impartial tribunal. Neither did that Court dispute that Petitioner had produced sufficient evidence of his counsel's diligence to create (at the least) a balanced record of whether or not Judge Turner's bias could have been uncovered sooner. Even the State's witnesses admitted that the

files revealing the conflict were generally "disorganized," and were located in various locations at the courthouse, including some files located in a basement vault not even accessible to the clerks who were providing the files to Petitioner's defense team. (App. at 110, 113, 118-21.) Nevertheless, Petitioner was given the burden of locating the recusal order (an unknown document) despite the fact that the State – in the person of Judge Turner and the prosecutor -- was well aware of its existence yet failed to disclose it.

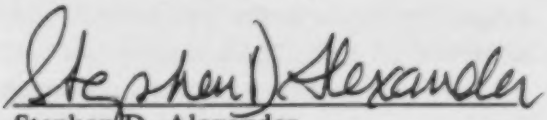
Without the added burden of proving diligence, Petitioner would have satisfied the single burden imposed by *Chapman* and its progeny. Under *O'Neal* in particular, a petitioner should not have to carry a burden beyond that. This Court should grant a writ of certiorari to implement Due Process Clause limitations on a state's procedural rules, which can be used to deprive a defendant under sentence of death of even the most fundamental due process right – the right to have his post conviction claims heard before an unbiased judge.

CONCLUSION

The record in this case presents issues ripe for this Court's review. A defendant sitting on Florida's death row has been denied one of the most rudimentary rights

guaranteed by the Due Process Clause – that of the right to an unbiased adjudicator. A state cannot not be permitted to impose unjustified and, in this case, unattainable standards on a defendant's right to due process of law. Petitioner respectfully requests that the petition for certiorari be granted.

Respectfully submitted,



Stephen D. Alexander
Fried, Frank, Harris,
Shriver & Jacobson
Counsel of Record for Petitioner
Walter Gale Steinhorst

Of counsel:
William A. Molinski
Jennifer L. Colyer
David R. Boyko

Supreme Court, U.S.
FILED

97 • 375 SEP 2 1997

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

WALTER GALE STEINHORST,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF FLORIDA

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

By: STEPHEN D. ALEXANDER
Counsel of Record
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
350 South Grand Street
Los Angeles, California 90071
(213) 473-2000

Of counsel:
WILLIAM A. MOLINSKI
JENNIFER L. COLYER
DAVID R. BOYKO

211PP

MANDATE

SUPREME COURT OF FLORIDA

To the Honorable, the Judges of the:

Circuit Court in and for Bay County, Florida

Whereas, in that certain cause filed in this Court styled:

WALTER GALE STEINHORST v. STATE OF FLORIDA

Case No.: **86,109**

Your Case Nos.: **77-708 77-709**

The attached opinion was rendered on: **June 5, 1997**

YOU ARE HEREBY COMMANDED that further proceedings he had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS the Honorable Gerald Kogan, Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, on the 7th day of July, 1997.

/s/
Clerk of the Supreme Court of Florida

SUPREME COURT OF FLORIDA

WALTER GALE STEINHORST,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

No. 86,109

[June 5, 1997]

PER CURIAM.

We review an order denying relief to Walter Gale Steinhorst, a prisoner under three sentences of death.[1] We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

Steinhorst was convicted on four counts of first-degree murder and sentenced to death for three of those murders.[2] This Court affirmed the convictions and sentences on direct appeal. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982). Steinhorst's first 3.850 motion alleged, among other issues, Brady[3] and Hitchcock[4] violations.

---

1 The facts and procedural history of this case are available in Steinhorst v. State, 574 So. 2d 1075 (Fla. 1991) (affirming denial of first 3.850 motion); Steinhorst v. State, 498 So. 2d 414 (Fla. 1986) (remanding for evidentiary hearing on first 3.850 motion); Steinhorst v. Wainwright, 477 So. 2d 537 (Fla. 1985) (denying petition for writ of habeas corpus alleging ineffective assistance of appellate counsel); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982) (direct appeal affirming convictions and sentences); see also Steinhorst v. State, 438 So. 2d 992 (Fla. 1st DCA 1983) (affirming order denying motion to substitute counsel for purposes of executive clemency application).

2 Steinhorst received a life sentence for the fourth murder conviction.

3 Brady v. Maryland, 373 U.S. 83 (1963).

That motion was denied following an evidentiary hearing before Judge W. Fred Turner in 1987.[5] This Court affirmed. Steinhorst v. State, 574 So. 2d 1075 (Fla. 1991). Steinhorst subsequently filed a second motion for postconviction relief[6] seeking to have the judgment on the first 3.850 hearing rendered null and void due to Judge Turner's undisclosed conflict of interest. Specifically, before becoming a judge, Judge Turner had represented and advised the estate of one of the murder victims. As a result, Judge Turner recused himself from the trial of one of Steinhorst's co-defendants, Charles Hughes, after informing Hughes' counsel of the conflict. According to Steinhorst's counsel, neither Judge Turner nor the State disclosed the conflict. Judge Turner's recusal order was first discovered in 1991 during a review of the court case files in preparation for Steinhorst's federal habeas corpus petition.

Footnote continued from previous page

4 Hitchcock v. Dugger, 481 U.S. 393 (1987).

5 Judge Turner did not preside over the original trial.

6 Although Steinhorst originally brought the motion pursuant to Florida Rule of Civil Procedure 1.540, we determined on appeal that the motion should have been treated as one brought under rule 3.850 alleging newly discovered evidence. Steinhorst v. State, 636 So. 2d 498 (Fla. 1994).

Judge Don T. Sirmons summarily denied Steinhorst's motion on procedural and substantive grounds. On appeal Steinhorst contended that the recusal order was not found during a 1986 review of the court case files because of clerical errors on the part of the clerk's office below. We held that if the information regarding the conflict was not reasonably available to Steinhorst and could not have been ascertained by the exercise of due diligence, then it would qualify as newly discovered evidence sufficient to require a new 3.850 hearing. On the other hand, if the information was reasonably available and Steinhorst did not move to recuse the judge, the right to recuse was waived. Accordingly, we remanded for a factual determination of whether the information regarding Judge Turner's conflict was known by either Steinhorst or his attorney, and if not, whether the information could have been ascertained by the exercise of due diligence. Steinhorst v. State, 636 So. 2d 498 (Fla. 1994).

Following an evidentiary hearing, Judge Sirmons entered an order denying Steinhorst's motion to set aside the 3.850 judgment entered by Judge Turner. The court concluded that while neither Steinhorst nor his attorney had actual knowledge, the fact of Judge Turner's recusal in Hughes' case could have been ascertained by the exercise of due diligence. With respect to the recusal order itself, the court found that Steinhorst's lawyers and their staff simply overlooked the recusal order during their earlier review of the court files in 1986. In support of this finding, the court noted that prior to 1988, all of Steinhorst's and his co-defendants' pleadings were kept in one filing system chronologically without reference to an individual defendant's name. According to the court, there was no basis to find that the relevant records had ever been misplace by the clerk's office.

Steinhorst contends on appeal that the court erred in finding that the recusal order was present in the court files during the 1986 review. At the evidentiary hearing, he presented the testimony of Christian Cox, the paralegal who

reviewed the court files in 1986 in preparation for the evidentiary hearing on Steinhorst's first 3.850 motion. Cox testified that she thoroughly reviewed the files and never saw the recusal order. Steinhorst posits that the recusal order was not in the files given to Cox in 1986. He argues that it was located in the basement vault, to which, according to the State's witness Reena Goss Baker, employees of the clerk's office would not have had access. In support of his argument that the recusal order was in the basement vault back in 1986, Steinhorst notes that the lawyer and paralegal who reviewed the court files in 1991 testified that they found the recusal order in some files that had been brought up from "downstairs" after their repeated requests for additional files.

However, there was also evidence presented suggesting a different explanation for why the Hughes recusal order may have come from the basement vault in 1991. State witness Gloria Tharpe, an employee of the clerk's office, testified that before 1988, all of the paperwork regarding Steinhorst and his co-defendants, known as the Sandy Creek files,[7] was kept together in a roughly chronological but otherwise unorganized fashion. She testified that these files were kept in a file room on the first floor next to the clerk's office. Tharpe further testified that in 1988, when it became necessary to prepare the record on appeal for Steinhorst's first 3.850 motion, she reorganized the Sandy Creek files by separating the paperwork according to individual defendant.

---

7 The events leading to the murders began at a site called Sandy Creek.

Reena Goss Baker corroborated Tharpe's testimony regarding the location of the Sandy Creek files. She testified that between 1985 and 1988, all the pleadings, motions, and orders for all the Sandy Creek defendants were kept on the first floor near the clerk's office. She further testified that only the State's exhibits were kept in the inaccessible basement vault during this time. It was only after the files were organized by individual defendant in 1988 that the files on inactive Sandy Creek defendants were placed in the basement vault.

When the evidence adequately supports two conflicting theories, this Court's duty is to review the record in the light most favorable to the prevailing theory. Johnson v. State, 660 So. 2d 637, 642 (Fla. 1995), cert. denied, 116 S. Ct. 1550 (1996). Under that standard, we will not alter a trial court's factual findings if the record contains competent substantial evidence to support those findings. We conclude that the evidence in the record supports the trial court's finding that in 1986, when Steinhorst's attorneys were preparing for the first 3.850 evidentiary hearing, the Hughes' recusal order was in the same court file that contained Steinhorst's paperwork. We note that even Cox testified that during her 1986 review of the court files, she recalled seeing documents with the names of Steinhorst's co-defendants. Her testimony was not inconsistent with Tharpe's and Baker's testimony that the pleadings of all co-defendants were kept together before 1988.

We also find the record contains competent substantial evidence to support the trial court's finding that "at no time did defense counsel seek to talk directly by letter, phone or personally to the defense counsel who handled the Hughes case as to what happened in that case." The following exchange took place during the cross-examination of Stephen Alexander, Steinhorst's primary postconviction counsel:

Q. Did you ever talk to any of the lawyers in the Charlie Hughes, the trial lawyer in Charlie Hughes' case?

A. Mr. Daniels?

Q. Yes.

A. No, I've never talked to him personally. I know that I attempted to reach him and people on my - that working for me attempted to reach him and I believe at the time I was told that he didn't want to cooperate.

Q. When was this?

A. I don't recall specifically. Now, it was sometime during the investigation period. We tried to attempt to reach every lawyer that had ever represented any of the co-defendants.

Q. All right. In the investigation period, do you know which period you're talking about?

A. We made an attempt to reach - and sometimes more than one attempt to reach every lawyer starting from when I got involved in the case probably early in 1983, up and including two weeks ago.

Q. All right.

A. I should say just to be complete, I personally did not talk with - Mr. Daniels, I believe, did speak with Ms. Jacobs sometime after September [1991].

Contrary to Steinhorst's assertion, Alexander's testimony does not unequivocally establish that he or his staff had attempted to reach Hughes' attorney before Ms. Jacobs did

in 1991. Alexander indicated that the investigation period ran from 1983 all the way up until 1994. He testified that he learned that Hughes' lawyer did not wish to cooperate after Jacobs spoke with him in 1991. The trial court's finding that there was no attempt to contact Hughes' attorney clearly refers to the time before 1986, for that is the relevant time period for purposes of determining whether due diligence was exercised. It is irrelevant that Steinhorst's counsel attempted to contact Hughes' lawyer in 1991.

Having upheld the trial court's findings of fact, we conclude that the trial court did not err in denying Steinhorst's motion for relief. Accordingly, we affirm the denial of Steinhorst's second 3.850 motion.

It is so ordered.

OVERTON, GRIMES, HARDING and WELLS, JJ., concur.
KOGAN, C.J., dissents with an opinion, in which SHAW and ANSTEAD, JJ., concur.
ANSTEAD, J., dissents with an opinion, in which KOGAN, C.J. and SHAW, J., concur.

NOT FINAL UNTIL TIME EXPRESS TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

KOGAN, C.J., dissenting.

I dissent from the majority's opinion. As I stated in Steinhorst v. State, 636 So. 2d 498, 501 (Fla. 1994) (Kogan, J., specially concurring), I believe that the appearance of impropriety created by Judge Turner was so grave as to create fundamental error under the due process clause of the Florida Constitution. Accordingly, I maintain, as I did previously in Steinhorst, 636 So. 2d at 501, that a new and impartial judge should hold a new evidentiary proceeding pursuant to Florida Rule of Criminal Procedure 3.850 and this Court's opinion in Steinhorst v. State, 498 So. 2d 414, 414-15 (Fla. 1986).

In its prior decision remanding for a specific factual determination, the majority recognized that this case raised grave due process concerns. Steinhorst, 636 So. 2d at 500-01. Specifically, the majority stated:

> A judge who is recused from a co-defendant's case also must be recused from another co-defendant's case if the reasons for recusal apply equally to both. There is no other conclusion that is consistent with one of the most important dictates of due process: that proceedings involving criminal charges, and especially the death penalty, must both be and appear to be fundamentally fair. As this Court noted in Scull v. State, 569 So. 2d 1251, 1252 (Fla. 1990):
>
> > One of the most basic tenets of Florida law is the requirement that all proceedings affecting life, liberty, or property must be conducted according to due process. Art. I, § 9, Fla. Const. . . . "[D]ue process" embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals. See Art. I, § 9, Fla. Const.

Steinhorst, 636 So. 2d at 500-01. Although the majority recognized that due process concerns existed, it concluded that it could address these concerns only under certain limited circumstances. According to the majority, the due process violation could be addressed only if Steinhorst did not waive his

claim pursuant to section 38.02, Florida Statutes (1991)[8] and rule 3.850. Steinhorst, 636 So. 2d at 500-01.

The trial court, on remand, determined that Steinhorst waived his right to recuse Judge Turner. With regard to section 38.02, the trial court concluded Steinhorst waived his claim because the information concerning the conflict was

---

8 Even if Steinhorst could have waived his claim, I do not think that section 38.02 alone could have served as a basis for that waiver. In my opinion, section 38.02 merely provides that, prior to final judgment, if a defendant does not file a suggestion for disqualification within 30 days of learning of the particular basis for disqualification then the defendant waives the right to raise that basis. This statute does not provide that a waiver occurs if information regarding a basis for disqualification is reasonably available and the defendant fails to file, within 30 days of when that information became reasonably available, a suggestion explaining the basis for disqualification. I recognize however that section 38.06, Florida Statutes (1991), in conjunction with section 38.02 could provide a basis for waiver if waiver was possible in this case. Section 38.06 provides that where grounds for disqualification as set forth in 38.02 appear of record in the cause, but no suggestion of disqualification is timely field, the order entered by a judge shall be valid. Accordingly, if information regarding Judge Turner's conflict was in the record as the majority concludes it was then, according to section 38.06, Judge Turner's order must be considered valid. I note however that a motion for recusal may be considered after final judgment if good cause for delay in filing is shown. See Fischer v. Knuck, 497 So. 2d 240, 243 (Fla. 1986). Regardless of how these statutes are interpreted, they cannot supersede a provision of the Constitution.

reasonably available prior to the date Steinhorst filed his notice of appeal.[9] With regard to rule 3.850, the trial court found that although the information regarding Judge Turner's conflict was not previously known to Steinhorst or his attorney, it could have been ascertained by the exercise of due diligence prior to the expiration of the time limit set by rule 3.850.[10] The trial court thus concluded that the information regarding the conflict did not amount to newly discovered evidence which is necessary to overcome the time limit set by rule 3.850.

The majority opinion in this case affirms the trial court's order and thereby recognizes, as it did in the prior decision, that Steinhorst's due process claim could be waived. As indicated in my prior opinion, I believe that Steinhorst's particular due process claim is nonwaivable under any construction of the facts. To hold otherwise casts upon the defendant an affirmative duty to investigate a judge's background for the possible sources of conflict. See Lightbourne v. Dugger, 549 So. 2d 1364, 1368 (Fla. 1989) (Barkett, J., concurring in part, dissenting in part). To impose such a duty is inconsistent with the dictates of our Constitution which, as the majority previously recognized, requires that proceedings involving criminal charges, especially the death

---

9 Again, I note that I believe it is actually section 38.06, in conjunction with 38.02, that the trial court should have identified as a basis for waiver See supra note 1.

10 The version of the rule in effect in 1988 gave Steinhorst two years from the time his judgment and sentence became final to file a 3.850 motion.

penalty, must both be and appear to be fundamentally fair. Accordingly, I cannot agree that Steinhorst waived his claim that Judge Turner's undisclosed conflict of interest required a new 3.850 proceeding before a new and impartial judge.

SHAW and ANSTEAD, JJ., concur.

ANSTEAD, J., dissenting.

Imagine the following scenario: this Court reverses a trial judge's summary denial of a death sentenced defendant's petition to set aside his conviction and sentence, and upon remand, the same judge conducts a hearing, but again denies the petition. Later, it is discovered that the judge who conducted the post-conviction proceedings had previously served as the lawyer for the murder victim's estate.[11] Not possible, you say? Certainly not possible in the United States of America, right? Wrong! This incredible sequence of events is the exact scenario approved by the majority today. We should not be parties to such an obvious miscarriage of justice, especially when the only remedy sought is a post-conviction hearing before an unbiased court.

Chief Justice Kogan is obviously right when he describes the blatant appearance of impropriety involved here—by a judge who literally held the power of life or death over the defendant. Here is what we said about his egregious conflict of interest in our earlier opinion:

---

11 The original trial and sentencing judge in this case is deceased.

> Steinhorst calls this Court's attention to a fact previously not disclosed to us. Prior to becoming a judge, Judge Turner had represented and advised the estate of one of the victims whom Steinhorst was convicted of killing. Their representation included giving counsel to the victim's family and the possibility of pursuing a wrongful death or other tort claim on behalf of the victim's estate. Judge Turner recognized the potential for serious conflict and entered an order of recusal in the trial of one of Steinhorst's co-defendants. No such recusal was ordered here, nor did the judge notify the parties of the potential conflict, even though the reasons for recusal applied equally to both cases.
>
> . . . .
>
> [I]f the relevant records were not reasonably available to Steinhorst and the conflict could not be ascertained by the exercise of due diligence, then the prior recusal would constitute newly-discovered evidence properly cognizable in a 3.850 motion. Moreover, such evidence would present grave due process concerns. A judge who is recused from a co-defendant's case also must be recused from another co-defendant's case if the reasons for recusal apply equally to both. There is no other conclusion that is consistent with one of the most important dictates of due process: that proceedings involving criminal charges, and especially the death penalty, must both be and appear to be fundamentally fair. As this Court has noted in Scull v. State, 569 So. 2d 1251, 1252 (Fla. 1990):

> One of the most basic tenets of Florida law is the requirement that all proceedings affecting life, liberty, or property must be conducted according to due process. Art. I, § 9, Fla. Const. . . . "[D]ue process" embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals. See Art. I, § 9, Fla. Const.

636 So. 2d at 500-01. Recently, in Maharaj v. State, 684 So. 2d 726, 728 (Fla. 1996), we treated a similar situation as follows:

> We also find that the ethical conflict issue in this case warrants reversal. Maharaj alleges that he discovered only recently that the trial judge who presided over this rule 3.850 proceeding was, at the time of Maharaj's trial, the supervising attorney of the assistant state attorneys who prosecuted Maharaj. Maharaj contends that he did not discover this information until he was allowed to review portions of the State's files. A specific procedure does exist for moving to disqualify a judge, Rogers v. State, 630 So. 2d 513 (Fla. 1993), but such a procedure was not followed in this case. Nevertheless, we find that the trial judge should have recused himself from the entire case if he believed he was ineligible to preside over an evidentiary hearing, regardless of whether a motion to disqualify was filed. Canon 3(E), Code of Judicial Conduct (a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned). Given these unique circumstances, combined with our

> conclusions that an evidentiary hearing is warranted on at least some of Maharaj's claims, we conclude that this case must be remanded for a full review before a new judge.

We should do no less here.

ETHICS

Ethically, it cannot be disputed that the judge and prosecutor had an obligation to disclose this judge's blatant conflict of interest as well as the fact that the judge had actually recused himself in a co-defendant's case because of this same conflict. Under our Canons of Judicial Ethics, a judge is expressly and affirmatively required to disqualify himself under the circumstances presented here.[12] There is not one word in

---

12 Canon 3E(1) provides:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (b) the judge served as a lawyer or was the lower court judge in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

Footnote continued

Footnote continued from previous page

(c) the judge knows that he or she individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

Fla. Code Jud. Conduct, Canon 3E.

the majority opinion about this obligation of the judge and the corresponding obligation of the prosecuting attorney to reveal this conflict and the prior recusal, even though our prior opinion specifically noted that "A judge who is recused from a codefendant's case also must be recused from another codefendant's case if the reasons for recusal apply equally to both." 636 So. 2d at 500-01. Similarly, there is no explanation in the majority opinion of the source of any duty on the part of the defendant to investigate and discover the trial court's conflict of interest. Indeed, the majority's focus is skewed by the absence of any analysis of the fundamental issue of conflict. This is not a "new evidence" case, where the burden is appropriately placed on the defendant. It is a conflict case involving the fundamental integrity of the post-conviction proceedings and our focus should be on the nature of the conflict and the misconduct of the trial judge in continuing to preside over the case.

In essence, our prior remand focused on whether there might have been a waiver of the right to seek disqualification of the judge, i.e., whether the defendant knew or had reason to know the grounds for disqualification but failed to act. In fact, we cited the statute which requires that disqualification be sought within thirty days of the time that a party has knowledge of the grounds for disqualification. Of course, for there to be even the possibility of a waiver, there must be knowledge of the matter waived. Yet, it is undisputed in this case that there was no knowledge by the defendant of the judge's serious conflict. We are talking about a document that counsel was totally unaware of and had no reason to know existed, much less have reason to search for in another defendant's papers.[13]

---

13 To make matters worse, the testimony of the clerks at the evidentiary hearing establishes that all the files for all the defendants in this case were reorganized in 1988. Given that

Footnote continued

NEEDLE IN A HAYSTACK

The "order" here was literally "a needle in a haystack," that we are holding voluntary collateral counsel should have found even sooner than they did. Of course, a defendant cannot ignore what is plainly there for him to see. But there was nothing here for the defendant to "plainly" see. Even under the majority's analysis, it is apparent that the State never refuted defense counsels' account of how and when they finally discovered by chance the recusal order located among papers concerning another defendant's case. In fact, the State verified the incredible mess that the court files were in. In addition, it is undisputed that the "order" in question was not specially titled to reflect its content and was not identified on any court docket, so as to alert a reader of its existence or importance. The bottom line is that these records were a mess,

---

Footnote continued from previous page

the files have been reorganized, and do not resemble now the state they were in in 1986 when Steinhorst's investigator went to the court to obtain them, there is no way Steinhorst can even attempt to show that the recusal order was not "reasonably available" to him at that time.

Moreover, further testimony of the court clerks reveals that none of them can say for certain that the codefendant's file containing the recusal order was not in the court's vault, which they did not have access to, such that Steinhorst's attorneys could not even have been given this information in 1986 when the files were requested.

and that counsel exercised great diligence in actually locating something that they should have had no need to even be looking for anyway—something the court and the State had a moral, ethical and legal obligation to tell the defense about from the beginning.

PRO BONO COUNSEL

The trial court ended up imposing an impossible burden—if it was there you had to find it sooner or file a motion to compel its production. Of course, Mr. Steinhorst was on death row, completely without access to the records in question. The due diligence demanded here was actually imposed upon voluntary pro bono counsel. It is worth noting that we don't even come close to applying such a high standard for the competency of counsel that a defendant is entitled to for his defense. Indeed, the use of such a standard under the circumstances here, especially for voluntary pro bono counsel, is tantamount to a "heads I win, tails you lose" application of the due diligence/competency standard.

CONCLUSION

This Court was concerned about both the fairness and appearance of fairness in Maharaj, and acted without hesitation to do something about it. Obviously, we should be even more concerned in Steinhorst's case, where the nature of the conflict so fundamentally undermines the fairness of these death penalty proceedings. What a blow to our justice system when we

permit a homicide victim's lawyer to later preside over the post-conviction judicial proceedings of the defendant.

KOGAN, C.J. and SHAW, J., concur.

An Appeal from the Circuit Court in and for Bay County,

Don Sirmons, Judge -
Case Nos. 77-708 & 77-709

Stephen D. Alexander and Lisa R. Kiebel of Fried, Frank, Harris, Shriver & Jacobson, Los Angeles, California,

for Appellant

Robert A. Butterworth, Attorney General and Barbara J. Yates, Assistant Attorney General, Tallahassee, Florida,

for Appellee

IN THE CIRCUIT COURT, FOURTEENTH JUDICIAL CIRCUIT, IN AND FOR BAY COUNTY, FLORIDA

CASE No. 77-708, 77-709

----------x

STATE OF FLORIDA,

:

Plaintiff,

:

-VS-

:

WALTER GALE STEINHORST

:

Defendant.

----------x

THIS CAUSE came on for hearing before the Honorable Don T. Sirmons, Circuit Judge of the Fourteenth Judicial Circuit of Florida, at the Bay County Courthouse, Panama City, Florida, on the 13th day of October, 1994, commencing at approximately 9:30 o'clock A.M.

APPEARANCES:

Hon. Alton Paulk, Assistant State Attorney, P.O. Box 1040, Panama City, Florida, 32402, on behalf of the State.

Hon. Stephen D. Alexander, Attorney At Law, 725 South Figueroa Street, Los Angeles, California, 90017-5438, on behalf of the Defendant.

INDEX

INDEX OF EXHIBITS

WALTER STEINHORST
- Direct Exam by Mr. Alexander 6
- Cross Exam by Mr. Paulk 8

STEPHEN ALEXANDER
- Testifying as a Witness 9
- Cross Exam by Mr. Paulk 19

CHRISTIAN G. COX
- Direct Exam by Mr. Alexander 40
- Cross Exam by Mr. Paulk 50
- Re-Direct by Mr. Alexander 54

IAN HAIGLER
- Direct Exam by Mr. Alexander 59
- Cross Exam by Mr. Paulk 65

ANN JACOBS
- Direct Exam by Mr. Alexander 68
- Cross Exam by Mr. Paulk 75

PETITIONER RESTS 76

GLORIA THARPE
- Direct Exam by Mr. Paulk 77
- Cross Exam by Mr. Alexander 99
- Re-Direct by Mr. Paulk 111
- Re-Cross by Mr. Alexander 113

REENA GOSS BAKER
- Direct Exam by Mr. Paulk 116
- Cross Exam by Mr. Alexander 120
- Re-Direct by Mr. Paulk 127
- Re-Cross by Mr. Alexander 130

CERTIFICATE OF REPORTER 137

INDEX OF EXHIBITS

DEPENSE EXHIBIT NUMBER

1, 2 38

3 43

4 56

5 57

6 58

STATE EXHIBIT NUMBER

1, 2, 3, 4 132

5 135

THE COURT: This will be in the State of Florida versus Walter Gale Steinhorst, Case Number 77-708 and 77-709. And, Mr. Paulk, is the State ready to proceed?

MR. PAULK: Yes, Your Honor, the State's ready.

THE COURT: Mr. Alexander, is the defense ready?

MR. ALEXANDER: Yes, we are.

THE COURT: And I believe we're here on an evidentiary hearing; is that correct?

MR. ALEXANDER: That's correct, Your Honor, pursuant to the remand of the Florida Supreme Court.

THE COURT: Correct. And that's in reference to an opinion rendered April 21st of 1994.

MR. ALEXANDER: Correct.

THE COURT: All right. Are we ready to proceed then? I believe under that mandate the defense goes forward; is that correct?

MR. PAULK: Yes, Your Honor, it's his motion, it's his petition. And I would just like for purposes of the record, I think, hopefully to clarify the issue, and I think it's contained in the opinion on Page 5 of that opinion, it says: Accordingly, we remand this cause for a factual determination regarding the availability of the relevant records on whether Steinhorst waived the issue of recusal. Which that's what it was remanded for.

So the primary issue is to determine whether this motion is successive in that the facts on which the claim is predicated and were unknown to movants or unknown to

movant or his attorney or could not be ascertained by the exercise of due diligence. It's all contained in the opinion.

And that's, I don't know if Mr. Alexander agrees, but that's what I see as the issue, is whether he's time-barred under 3850 for the lack of exercising due diligence and that the matters complained of in this particular motion were available to him at the time by the exercise of that due diligence.

MR. ALEXANDER: Your Honor, while I agree that it's contained in the opinion on Page 5 and I think the Court was - and the Supreme Court was very specific in terms of what it said when it said also that the trial court determines that quote the facts on which the claim was predicated were unknown to the movant's or the movant's attorney and could not have been ascertained by the exercise of due diligence, close quotes, citing 3.850 B (1), then it should grant the motion for post-conviction relief, vacate the 3.850 judgment entered by Judge Turner to conduct new evidentiary proceeding pursuant to Rule 3.850, in this court's opinion, in prior Steinhorst case.

So basically what they have directed you to determine is whether or not my client Mr. Steinhorst knew about Judge Turner's prior representation of one of the victims, Mr. Sims' estate, and assuming that he didn't know, whether or not his attorneys, including myself, knew; and if we didn't know, then whether or not could have been ascertained by the exercise of reasonable due diligence, and whether we conducted reasonable due diligence, and we're prepared to put on evidence to show today that in fact we did not know, that we did proper due diligence, inquired, asked for the record and for whatever reasons the records were not shown to us at the time we asked and therefore we didn't know until it was discovered in September of 1991, in which case we promptly filed a motion which now brings us to this proceeding.

And unless you would like some further discussion or argument, I'll just go ahead and call my first witness.

THE COURT: Okay. I think everyone's in line with what the opinion says, so I think you can go ahead and call your first witness.

MR. ALEXANDER: Okay. I call to the stand my client Walter Steinhorst.

THE COURT: Be all right for Mr. Steinhorst to remain where he's at. If you would raise your right hand, Mr. Steinhorst.

(DEPENDANT PLACED UNDER OATH)

MR. PAULK: Excuse me. Are you going to invoke the? If not, I'm going to bring my witnesses on up here.

MR. ALEXANDER: I'm not going to invoke any rule. I don't think there's anything, unless you want to.

MR. PAULK: If you could call Reena and Gloria.

THE COURT: You may proceed.

MR. ALEXANDER: Just note for the record that my client has suffered some strokes recently, so his speech is sometimes slurred and he has some trouble hearing and understanding.

THE COURT: If there is a problem, we'll note that Mr. Steinhorst is in a wheelchair and we can move the microphone down so he can have the benefit of speaking into the microphone.

MR. ALEXANDER: I just don't know for the court reporter, that's the only thing.

(Microphone not working)

MR. ALEXANDER: Let's just try it and see.

THEREUPON

WALTER STEINHORST

being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. ALEXANDER:

Q Mr. Steinhorst, did you ever learn that Judge Turner had been involved in the case of Charlie Hughes?

A No.

Q Did you ever learn that fact?

A No.

Q Did there ever come a time when Ann Jacobs told you about that?

A Yes. She told me - (inaudible words).

Q Okay, and that was a couple years ago? Okay, Mr. Steinhorst, I'll start again. Did there ever come a time when you learned that Judge Turner, that is the judge that heard your 3.850 hearing several years back, had been involved in Charlie Hughes' case?

A Yes. Ann told me about it.

Q And that's Ann who?

A Ann Jacobs.

Q Is she in the court today here?

A I guess so.

Q I know you have a hard time seeing. He's got one very bad eye. And prior to that did you ever learn that, had you ever heard that Judge Turner had been involved in Charlie Hughes' case?

A No.

Q Now, Charlie Hughes was tried sometime after you were tried.

A Yes.

Q And were you brought over here at the State's request for Mr. Hughes' trial?

A Yes, I was.

Q Did you ever actually attend the trial?

A No.

Q You were in the jail.

A Yes.

MR. ALEXANDER: Okay. I have no further questions.

CROSS EXAMINATION BY MR. PAULK:

Q I just have one. The lady that you said Ann, what was her last name?

A Jacobs?

Q Jacobs. When was it that she informed you that Judge Turner had recused himself; do you remember?

A Couple years ago.

Q Okay.

A Told us about it.

MR. PAULK: All right. I don I t have any other questions.

THE COURT: Okay. Thank you.

MR. ALEXANDER: Your Honor, I would request that the Court take judicial notice of the fact, in fact the State will also stipulate to it, that Judge Turner was not in fact the trial judge for Charlie Hughes' case.

MR. PAULK: That's correct.

THE COURT: And the Court will take notice of that fact.

MR. ALEXANDER: Okay. I call as my next witness, Your Honor, myself. And I have previously asked Mr. Paulk if I need to bring down another lawyer to examine me and he said that under the circumstances he would waive that formality.

THE COURT: All right.

THEREUPON

STEPHEN ALEXANDER

being duly sworn, testified as follows:

MR. ALEXANDER: I've never testified before in any proceeding, although I have examined a lot of witnesses, this is the first time. And without asking questions I'll do it kind of as a narrative, if that's all right with the Court.

THE COURT: All right.

MR. ALEXANDER: I became involved in Mr. Steinhorsts' defense in 1982, in the fall of 1982. I was asked technically by the Legal Defense Fund in New York, my firm was, if we would represent some inmates on death row in Florida in connection with their clemency hearings. And in Florida you have a right to clemency and a right to an attorney. And at that time there were a number of people on the public defender's office was, had conflicts plus getting Florida attorneys because of the number and the commitment, so they had asked lawyers from New York and in fact the request had come from then Governor Graham's office.

In 1982 together with some associates and paralegals from my firm we began investigating the facts, what are the facts involved in Mr. Steinhorst's case. Between 1982 and 1986, when we filed 3850, which then became a subject of Judge Turner's decision and ultimately this motion, I personally made several trips to Florida as well as with particular Wynn Sider (phonetic), who was associate with me at that time working on this case, and among other things we interviewed Mr. Steinhorst, we interviewed his former attorney Cliff Davis, we reviewed and obtained Mr. Davis's files, we went to the Florida Supreme Court and reviewed the record there.

We went to the federal court because there was a prior federal proceedings and trial that preceded the state court trial and reviewed the records there and obtained records there. We came to Bay County and asked to see the files here in Bay County related to this matter. We went to the state attorney general's office and asked to see files there. We filed a Freedom of Information Act with the FBI because the FBI had been involved in the investigation and indeed the FBI had been involved in the so-called sting operation that set up the Sandy Creek drug smuggling, although they had failed obviously to execute the bust and therefore the bugging operation went forward.

We filed a request under Florida state law, various government and law enforcement agencies, including I believe the FDLE. Obtained records from that. Attempted to obtain records from the state attorney's office, but at that time they weren't cooperative.

We attempted to interview various witnesses and investigators. We also attempted to get and in some cases we got cooperation from some of the lawyers and some of the co-defendants and other people involved in either the federal trial and/or the state trial.

And during that period of time, as I say, we made what I considered to be a thorough and diligent search of various court records and filings to get information related to Mr. Steinhorst' case.

Additionally in connection with is clemency, which we filed with Governor Graham, was heard by Governor Graham, and secondly, a habeas proceedings which we filed directly with the Florida Supreme Court. We had probably more than, although I don't purport to be an expert in death penalty cases, haven't handled as many as some others, but we had an extraordinary amount of time conducting investigation because initially our appointment as counsel, clemency counsel for Mr. Steinhorst was opposed. And indeed the judge, and I forget his name, may be still on the bench, appointed Dedee Costello, who was then in private practice, she's now a judge of this court, as clemency counsel and the intermediate circuit court when we appealed that said that we could be co-counsel, so we were co-counsel with Ms. Costello.

Well, at the time when I learned in September of 1991, and I'll get to how that came about from Ann Jacobs, about the orders that had been filed in Judge Turner's representation and recently I re-examined the files that we maintained in this action to see if there was any record that we had seen or been given a copy of the order of disqualification and there was

none. And there is none. We did not get that order nor did we know about that order prior to Ann Jacobs telling me in September of 1991.

In February, I believe, if memory - we filed a 3850 petition in this court. We heard no response, received no response from the State - There was no response received from the Court until in November of 1991, and this I remember very clearly, Your Honor, because this is my first and only death penalty case, I received a call in my office from a newspaper reporter in Florida who informed me that a warrant had been signed for Mr. Steinhorst's execution.

I've been practicing law for sixteen years and I remember hearing that. And I was shocked. Because we had pending 3850, we heard nothing from the Court, and I asked him how that could happen and he read me a press release that had been issued by Governor Graham and it said that the Bay County Court had denied Mr. Steinhorst' 3850 and that was the first time that I ever knew Mr. Steinhorst' 3850 had been denied.

Needless to say, after I recovered from my surprise in learning that my client's 3850 had been denied and I never received notice of it and that there was a warrant for his execution, I believe it was for the Tuesday following Thanksgiving, I got on the phone with CCR. That's an organization here that had been formed by statute to assist death row inmates in a post-conviction proceeding and they had been involved in the case as sort of local counsel assisting me. I was then in New York practicing in New York at that time.

As to ascertain if they knew about this or could find out anything about it and they were in shock, and at that time, several conference calls, we instructed one of their investigators, paralegals, Christian Cox, to come over here to the Bay County Courthouse to see if we could find this order that had been entered by Judge Turner denying Mr. Steinhorst'

3850. And Ms. Cox did come over, she reported. She asked to examine the files and she will testify later. And after some search, this order was found and there was absolutely no record in the file that Judge Turner or whoever was responsible, be it his clerk or the clerk' s office, had ever served a copy of the order on either myself or for that matter the state attorney's office, Mr. Paulk stipulated at a subsequent hearing that they did not receive notice of it. Nor pursuant to the statute itself had it been served on my client Mr. Steinhorst.

With a warrant for my client's execution I spent the next twenty days literally twenty-four hours a day together with others at CCR and the whole team of attorneys that I assembled from my firm, filing papers, we had papers on file all the way to the United States Supreme Court as well as conducting investigations in looking for, you know, every which way we could to get Judge Turner's decision overturned.

That was the first time that I had heard that Judge Turner was in fact assigned to this case. One of the avenues of investigation was since we found out that he had summarily denied it without any kind of hearing, without any kind of argument, without any kind of response from the State, was a concern whether or not there was some way in which we could get Judge Turner to recuse himself or got him removed from the case.

In addition to talking to the attorneys, including Mr. Spaulding and others, at the CCR and finding out about Judge Turner, and I will say candidly the information I received concerning Judge Turner and his reputation and his background was not favorable and certainly not the type of judge that I would want to have by any choice to hear Mr. Steinhorst's case. And indeed I spoke to at the time Ms. Costello, who then was a judge, she couldn't hear the case and she had been co-counsel with us.

And Ms. Costello among others also advised me that Judge Turner was not a judge that if I had my choices I should want, if there was any way she could suggest, I asked her if she know of anything of the grounds, she didn't know of anything at that time. She did tell me I think she had actually reported as had a run-in with Judge Turner and I think she made a report to whatever judicial commission and I read some reports about him elsewhere, probably not relevant for purposes of this hearing. But in any event, Ms. Cox came over and looked at the file. What was reported to be the entire file.

Subsequently because she was concerned that parts of the file were missing, including for purposes of the then pending motion or then legal proceedings we were attempting to get Judge Turner's decision overturned and the warrant stayed, discovered that significant portions of the file, including the transcript, record of the case, were not in Bay County. They had been sent, and by that I mean record of and I guess to use the word the case here loosely, but I was referring to the record of Mr. Steinhorst's trial. The case Number 77-708, so far as I've been informed and be able to ascertain were numbers that was used for all the various trials and proceedings here including the subsequent trial of Charlie Hughes which occurred in 1981, which was about three, four years after Mr. Steinhorst's trial in 1978, '77, '78.

In any event when we learned that the record was not here and thus Judge Turner could not have even looked at the record, which was what was at issue at the time when he did it, sent another investigator, paralegal, over to re-examine the files and ascertained that in fact after questioning and after asking the clerk to look everywhere that he could think of that it was not there, I believe again the State, Mr. Paulk will correct me if I'm wrong, later conceded that it was found by the Florida Supreme Court, that the record, including the transcript, all the stuff with all materials related to Mr. Steinhorst that went up to the Florida Supreme Court were not in Bay County. And the Florida Supreme Court ultimately prior to Thanksgiving stayed

Mr. Steinhorst' execution, reversed and remanded what was technically Mr. Judge Turner's second decision, because at my request he did vacate the initial decision and then instantly reinstated it by, therefore giving us the right to appeal since we had gotten no notice.

Clearly, Your Honor, I can state unequivocally that had I known and had any of these investigators brought to my attention that in addition to not giving us notice, to not reading the record, Judge Turner had what the Florida Supreme Court said was a clear conflict. I would have used that because my client's life was literally at stake in a matter of days. I did not know and that had not been brought to my attention.

Following the, Florida's remand, we had an evidentiary hearing. Mr. Paulk actually examined all papers and files, part of that. And after Judge Turner again denied the motion and went up to Florida Supreme Court, it was affirmed. We began preparing and at that point the Volunteer Lawyers Resource Center, which is funded in part by the federal government and assists again volunteers, pro bono attorneys such as myself in death penalty cases, particularly in connection with federal proceedings, that's their primary mandate, became involved in the case and we began preparing our federal habeas petition, which was in fact filed in federal court and it was in connection with that that Ann Jacobs and Ian (phonetic) Haigler came over as part of again a rereview, and we have periodically again updated our investigation and done additional investigation, because periodically people call us among other things and say they have information, sometimes it turns out to be useful, sometimes it doesn't. This case has had a lot of notoriety, lot of publicity, and we re-examined the files and we did that, (a) because we were preparing that, and (b) because when we re-examined the files there are new things there, sometimes there have been in fact subsequent habeas proceedings which have been filed including David Goodwin went through a whole habeas proceeding not too long ago here.

So we always examine the files. Sometimes some of the lawyers, for example for Mr. Goodwin, have been cooperative and some of them haven't been cooperative with us. He's had different lawyers at different times. And it was in connection with that review conducted by Ms. Jacobs, and she will testify as to what happened, that she discovered that Judge Turner had recused himself in connection with Charlie Hughes' case and brought that to my attention.

And we immediately filed the papers here. And that was the first time that I or anybody involved in Mr. Steinhorst' defense knew of Judge Turner's recusal and his representation of the Sims' estate.

I have nothing further to say on the subject.

THE COURT: Mr. Paulk.

MR. PAULK: Thank you, Judge.

CROSS EXAMINATION BY MR. PAULK:

Q Mr. Alexander, let me just get some times sequence. As I understand your testimony, you were - you became involved in the defense of Mr. Steinhorst in 1982.

A Yes, in the fall, about October, November.

Q All right. And --

A Been a long time. Lot longer than I thought it was going to be.

Q And when did you file his first post-conviction relief motion? Was the one in 1986 the first one?

A Well, we filed a direct habeas to the Florida Supreme Court in 1983. And I think it was towards the and of 1983, because it wasn't until sometime towards the end of 1983

that the District Court of Appeal had decided the issue on representation.

Q And the habeas in 1983 to the Supreme Court, do you recall what the basis for that was?

A Well, as usual it was about fifty different issues that we raised, but the principal one and the principal reason for being in the Florida Supreme Court was ineffective assistance of counsel in connection with his direct appeal.

Q Okay. But not ineffective assistance 20 of counsel at trial.

A I' m sure that was mentioned in the brief, but the principal focus and basis for our alleged jurisdiction was in connection with the appeal and failure to effectively argue and raise on appeal various issues.

Q All right. And you filed, you personally filed, you don't know if anybody filed prior to 1982 any 3850s.

A Not to my knowledge, and certainly there's none been reflected in the file here. They would have to be filed here.

Q Okay. So 1986, do you remember what month that was in 1986 you filed --

A I believe it was February.

Q All right. And that, I believe, was after the death warrant was signed by the governor --

A No.

Q -- Steinhorst?

A No.

Q It was not?

A No, it was filed before, and the death warrant was signed by the governor in November after Judge Turner had sometime in March summarily --

Q That's what I'm trying to get straight. You filed in February of 1987 a post-conviction. . .

A February, 1986.

Q Yes, I'm sorry. I' m not trying to mislead you. Okay. And that sat until Judge Turner denied it, which you subsequently found out, when did he deny it?

A I believe and it's in the record, in March, it was like a month or so after it had been filed.

Q Okay. It was filed in February and March it was denied. When was the governor's death warrant for Mr. Steinhorst signed?

A I believe it was in the first week of November. Sometime around the sixth or seventh of November.

Q Same year. Okay. And I believe you indicated you scrambled around, Judge Turner then - what kind of an order did he re-enter then?

A We came down here, that's when I first met you.

Q Okay.

A And I made a request that because there had been no notice that he vacate his order, which he did. Because otherwise we would have had to have gone by mandamus because the order had been, the original order had been signed it March and the time for appeal had expired.

Q He vacated and set aside his order.

A He vacated and set aside his order --

Q -- opportunity so you would have a right to appeal it direct.

A Right, and then --

Q Then he denied it again.

A Denied it again.

Q Okay. And he denied it then, I believe you appealed with, what, First District Court.

A No, appealed it to the Supreme Court.

Q Okay. And was that in the same year or was that in --

A That was in November, which was in - I think we filed - well, we had the appellate papers ready before . . .

Q That's when the record on appeal was prepared and sent somewhere around --

A No, my understanding again from the - was that the record on appeal from his direct appeal was prepared in '78 and sent up and his direct appeal was heard and was decided in 1981, before I got involved.

Q I'm talking about the record on appeal of the judge's denial of the 3850.

A Oh. Yes. That record on appeal was . . .

Q Immediately done; right?

A Yes, that record consisted of about a twenty minute transcript and the 3850 and the two orders.

Q All right. And I believe the Supreme Court stayed execution at that time?

A Right.

Q And remanded back for an evidentiary hearing.

A As I recall, it was - I think it was heard on Monday. I remember it because we had big Thanksgiving plans and everybody was assuming I was going to be in Florida or in United States Supreme Court on Thanksgiving weekend and it was heard I believe on Monday prior to Thanksgiving that year.

Q But the Supreme Court stayed execution. Directed that Judge Turner hold an evidentiary hearing.

A Right. Reversed and remanded.

Q And that then led us, I believe, to an evidentiary hearing back in September of 1987.

A Correct.

Q Now, you indicated that - all right, after this, you felt like and you did an investigation apparently after 1986, an investigation concerning Judge Turner.

A I did an investigation in November of 1986 with respect to Judge Turner because I wanted every item I could have for the Florida Supreme Court to get the warrant executed and Judge Turner's decision overturned.

Q So at least in November of 1986 you realized he was a judge you did not want to have on your case if you could find a legal reason to got him off.

A That's correct.

Q Okay. Now, from November of 1986 until the evidentiary hearing in 1987 - would you agree that until 1986 it wasn't material or Judge Turner's being the judge did not become material until then.

A Not until November when we found out - that was the first time that we found out he was involved in the case, correct.

Q But it would continue to be material as long as he was on the case.

A That's correct.

Q All right. November of 1986, what records did you check to determine any cause or - well, let me, what records did you check after November of 1986?

A In November of 1986, as I said, I instructed through CCR their investigators to come over here and review the records concerning Sandy Creek trial. Now, we weren't focusing on Judge Turner. We were focusing on Judge Turner because one of the principal things we were looking for was this mysterious order that we had never seen that he signed and whatever else he might have done in the case.

Q And the mysterious order you're talking about is which one?

A The order that is --

Q Denying the 850?

A Yes.

Q Okay.

A That we never received. That you never received.

Q Not the mysterious order that you never saw concerning his recusal.

A Right. We didn't know of the existence of that order.

Q All right. Do you know how often between November, 1986, to September of 1987, when we had the evidentiary hearing that CCR - we're talking about capital side of the original trial?

A Correct.

Q Do you know how many times they sent personnel over here to look at the quote Sandy Creek file?

A Well, in November they sent two different people over here in that two week period from say about November 6th through about November 20th. I had people from my staff attorneys working with me over here since we had a hearing here. And I know we arranged for, as you pointed out, and had the record on appeal sent up.

Q That's . . .

A CCR, after the Florida Supreme Court decision and prior to the September hearing, I don't know, I have no record or no recollection that they sent somebody else over here, here to Bay County, to look at the records.

Q That's what I'm talking about.

A Yeah.

Q Okay.

A May have sent people over here to file things, but . . .

Q Okay.

A Although I filed most things directly.

Q The - there were affidavits filed with the, this most recent 3850 where you raised the grounds that Judge Turner should have recused himself or that the, the issue we're on here.

A Correct.

Q Affidavits from Christian G. Cox.

A Correct.

Q And also Mr. Haigler.

A Correct.

Q And Mr. Haigler is here present to testify.

A Correct.

Q Thank you. Christian Cox. Is she here to testify?

A Yes, she is.

Q Okay. Are those the two people that you sent over here between November of 1986 and September of 1987 to look at the file?

A Right. In November, yes.

Q Sent them over between November 6th and --

A Approximately November 20th or thereabouts. It was right before Thanksgiving.

Q All right. And that was in the year of 1986?

A Correct.

Q Okay. You sent them back or did they come back over or do you know, I know they're here to testify, do you know if they came back anymore after that?

A I don't believe that they came back after that to look at Bay County records.

Q Okay. The next time somebody came to look at Bay County records was in 1991, when Mr. Haigler came over?

A Along with Ms. Jacobs.

Q Along with Ms. Jacobs. Okay. And I believe you attached in the, the present 3850 you attached a copy of the order of recusal.

A Correct.

Q Okay. And when was that petition filed? I know it's reflected in the record, but what is your recollection?

A It was in, I believe, the first week of October of 1991. I have a copy of it here if you want me to look for it.

Q That's close enough. Okay.

A You were asking me before what else I did in reference to Judge Turner. I told you about Bay County and I previously testified in addition, you know, we asked people, you know, if there was a basis or if they know of anything, we also got some decisions that he had written in I believe it was

either the Florida Supreme Court or judicial commission, information on some investigations, and we were also aware from - either somebody told us or we got a newspaper article that he had actually been in prison and was pardoned by Richard Nixon, I believe for income tax evasion.

Q From September of 1987 until October of 1991, the - Ms. Jacobs and Mr. Haigler were the only ones that came over, to look at the file?

A Yes. At least on - as part of my . . .

Q How many times do you recall?

A How many times did they come over?

Q Yes. Between September of 1987 and --

A I'm only aware of the time that they came over in September.

Q Okay. Well, they came over in September of 1991,

A Right.

Q Okay. That was when they found the order.

A Right.

Q I'm just trying to get some time sequence straight. Did you ever talk to any of the lawyers in the Charlie Hughes, the trial lawyer in Charlie Hughes' case?

A Mr. Daniels?

Q Yes.

A No, I've never talked to him personally. I know that I attempted to reach him and people on my - that working for me attempted to reach him and I believe at the time I was told that he didn't want to cooperate.

Q And when was this?

A I don't recall, specifically. Now, it was sometime during the investigation period. We tried to attempt to reach every lawyer that had ever represented any of the co-defendants.

Q All right. In the investigation period, do you know which period you're talking about?

A We made an attempt to reach - and sometimes more than one attempt to reach every lawyer starting from when I got involved in the case probably early in 1983, up and including two weeks ago.

Q All right.

A I should say just to be complete, I personally did not talk with - Mr. Daniels, I believe, did speak with Ms. Jacobs sometime after September.

Q Okay. And is Ms. Jacobs an attorney?

A Yes, she is.

Q Was she an attorney back in '82 to '91?

A I believe so, but you'll have to ask her. I believe so.

Q When you talked about back in the time when you had - you referred to transcripts and records of trial in Charlie Hughes, excuse me, in Steinhorst case. The time frame you were talking about that you discovered that the trial

transcript was not in Bay County, that would have been in March of '86 when Judge Turner had denied the motions, 3850.

A Well, we discovered that fact in November of '86.

Q During that period of time.

A And I think it was later ascertained that it had never been returned from the Florida Supreme Court.

Q The question I'm asking you is that was the trial transcript; is that correct?

A Well, it was the trial transcript and the other materials that were part of direct appeal record.

Q That's what I want to know. What materials are you talking about? Talking about pleadings in the court file?

A I don't have a photographic memory of everything that was part of the direct appeal record. But it certainly included the transcripts and I believe there were some other documents and exhibits that were part of beyond just the trial transcripts themselves. But I don't remember specific piece of paper.

Q Okay. You're aware of the distinction between trial transcript and the record on appeal prepared the clerk here locally in Bay County, or are you?

A I'm aware that they are documents. They're all part of what I believe is referred to by the Florida Supreme - well, depending on parties designating the record on appeal.

Q All right. Did you ever personally see any of the records on appeal over in the Supreme Court?

A Yes.

Q And let me ask, the trial transcript, that is the question and answers of the trial that was done prior to '82, that was in the Supreme Court.

A That's what I'm told.

Q All right. What I'm asking is your knowledge.

A Did I actually see the trial transcript at the Florida Supreme Court?

Q Right.

A I can't say for sure I remember actually seeing it. I know we went to Florida Supreme Court and I saw records there. I got copies of the trial transcript, the questions and answers, from Mr. Davis. So if they were there when I went over there, all I would have done was check to make sure that the same volume, looked at the index. I wouldn't have reread them.

Q Have you checked the Bay County records since 1991 to determine whether or not the trial transcript has ever been returned back to Bay County?

A No, as a matter of fact I haven't.

Q Are you aware that trial transcripts are seldom sent back to the court originating?

A As you know, I don't practice here, so I don't know what the, if that's a fact or if that's customary, if that's the practice or not. I do know that the Florida Supreme Court when it remanded, I think strongly implied, if not said directly, that they thought that the Judge Turner should have reviewed the trial transcript and that it would be relevant and said he was going to. I believe that in fact he never did, but . . .

Q That's not my point. My question is, do you know if the Supreme Court ever sends routinely the trial transcript --

A I don't know if - I'm not an expert, I don't . . . practice of Florida Supreme Court is with respect to trial transcripts, if there is such a practice.

I guess I can object to his questions of me; right?

MR. PAULK: And I don't think I have any other questions of this witness.

THE COURT: Anything further?

MR. ALEXANDER: Next, and I've spoken to Mr. Paulk before rather than calling him to the stand because he's informed me before - (inaudible word) - I would like the record to reflect that Mr. Paulk during the time of the proceedings and he was counsel for the State during the 3850 before Judge Turner, did not personally know Judge Turner's conflict.

MR. PAULK: That's correct, Judge, I did not.

MR. ALEXANDER: And I also would --

MR. PAULK: Well, suggest the words conflict, that he had recused himself in the Charlie Hughes case.

MR. ALEXANDER: Well, the Florida Supreme Court already determined the conflict.

MR. PAULK: I was not personally aware nor had any knowledge that Judge Turner recused himself in the Charlie Hughes trial, criminal case.

MR. ALEXANDER: I also said that I would be prepared to subpoena and bring over Mr. Appleman, who was the state attorney at the time, that was involved in the trial of Mr. Hughes to establish the fact and the fact the state attorney's office did know of this fact. Will you also stipulate to that?

MR. PAULK: I will stipulate Mr. James Paul Appleman, who is the state attorney for the Fourteenth Judicial Circuit, and John Harrison, who is no longer with the state attorney's office, were the trial counsel in the Charlie Hughes case and that both of those individuals were aware that Judge Turner had recused himself.

MR. ALEXANDER: And it is also a fact that during the entire time period prior to our discovering the following motions nobody from the state attorney's office ever informed either, any of the defense counsel of this fact.

MR. PAULK: I have no problem with that stipulation either. Because I think I am the only one that worked with defense counsel during the period of time of 3850 evidentiary hearing.

MR. ALEXANDER: And also --

MR. PAULK: Somewhere around November, 1986, somewhere along in there.

MR. ALEXANDER: In an effort to make the record clear and perhaps save the Court some time, I think we can stipulate that since we were both present for all the proceedings that Judge Turner never raised the issue himself.

MR. PAULK: I think the record will reflect that and I will so stipulate.

MR. ALEXANDER: Okay. Next I would like to have entered in evidence, although they are actually probably part of

the record here, and I don't know what your procedure for marking, the two orders that are in the file. You want to mark them as. . .

THE COURT: Defense exhibits.

MR. ALEXANDER: Defendant's Exhibit 1 and 2?

THE COURT: 1 and 2.

MR. PAULK: (Examining) Judge, they're in the file. I was going to have them pulled - pointed out in the file. I have no objection to them --

MR. ALEXANDER: . . . shown the witnesses and other things will be part of the record. I know they are part of the record.

MR. PAULK: Yes. They're part of the Bay County court files. May not be a part of the record selected to go on appeal.

MR. ALEXANDER: Right, that's why I wanted to get them, unless you're going to put the entire file in.

MR. PAULK: Well, I probably will. I don't know that we'll mark them as evidence and keep them in a vault somewhere, but the pertinent records I would intend to have marked and they can be maintained I guess as a regular part of the clerk's system.

I have no objection to these, Judge, if he wants to put them in individually.

MR. ALEXANDER: One for you and then . . .

THE COURT: All right. We'll mark those as Defense Exhibits 1 and 2 in evidence.

MR. ALEXANDER: And 1, I guess, would be, like to do them in chronological order, would entitled "Order", and it's dated July 9th, 1981, signed by Judge Turner, and it's in Case Number 77-708 CF.

(MARKED BY THE CLERK)

MR. ALEXANDER: And 2 is an order of consolidation, reassignment dated July 15th, 1981, signed by Judge Turner and I believe initials on the 14th by somebody, JPD, which I believe are the initials of Mr. Daniels, the attorney for Mr. Hughes, and a John, who I believe was one of the state attorneys.

MR. PAULK: It would have been John Harrison, Judge.

THE COURT: All right.

(MARKED BY THE CLERK)

MR. ALEXANDER: Next I would like to call to the stand Christian G. Cox.

THEREUPON

CHRISTIAN G. COX

being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. ALEXANDER:

Q Good morning, Ms. Cox.

A Good morning.

Q Please state your full name for the record.

A My name is Christian G. Cox.

Q And where do you live?

A I live in Decatur, Georgia,

Q And by whom are you currently employed?

A With the Georgia Appellate Practice and Educational Resource Center in Atlanta.

Q And in 1986 by whom were you employed?

A With the Capital Collateral Representative in Tallahassee.

Q And could you state just briefly for the record what that organization was doing in 1986?

A In 1986 and currently, assists in representation of death sentence inmates in Florida.

Q Okay. And what was your position at that time?

A At that time I was a paralegal. Later I became a paralegal and investigator.

Q Okay. And in 1986 did you have occasion to work on the Walter Steinhorst case?

A Yes, I did.

Q Okay. Now, in an effort to speed things up, and I can go through it all, Ms. Cox has prepared a resume of her professional experience and I would offer it as an exhibit.

MR. PAULK: The only objection I would have is the materiality, is what her experience was prior to 1986.

MR. ALEXANDER: Well, it lists it, goes all the way back.

MR. PAULK: Well, I know, but I would assume that probably it starts from 1994. The material issues. . .

THE COURT: I don't think --

MR. PAULK: In 1986 this was material - well, let me see what she is going to testify to first, see whether or not this would --

MR. ALEXANDER: I can take her through her employment history if you want. I was just going to try and --

MR. PAULK: I don't have any problem with the utilization of this.

MR. ALEXANDER: Well, let's mark it as Defense Exhibit Number 3 for identification.

THE COURT: Do it that way and . . .

MR. PAULK: As to what extent this becomes material depends on when she is testifying, because my understanding, 1986 - well, I don't know what period of time she did any sort of --

THE COURT: All right.

MR. PAULK: -- inquiry.

THE COURT: You may proceed.

MR. PAULK: If we can reserve that until the end of your questioning, other than - we'll probably save some time.

Q (Mr. Alexander continuing) Well, we can go backwards, forward. Prior to 1986, can you tell the Court and

describe what type of work you had done as a paralegal in connection with death penalty cases or criminal cases?

A I had worked for several law firms as a legal secretary and paralegal in not only death penalty cases, but other complex litigation cases.

MR. PAULK: Judge, let me do this;. I'm going over this right now. I have no - this is a judge hearing, to whatever extent any of this may be relevant I'll trust the Court to be able to separate the wheat from the chaff. So stipulate to make exhibit of it.

THE COURT: We can go ahead and mark it in as Defendant's exhibit in evidence.

Q (Mr. Alexander continuing) I show you what's been marked as Defense Exhibit 3. Is that a true and accurate statement of your work experience resume?

A Yes, it is.

Q And as part of your duties prior to November of 1986, had you been asked by your various superiors at your firms and including CCR to examine court files and court records?

A Yes, I have.

Q And had you been trained in connection with examining court files and court records?

A Yes, I have.

Q And were you familiar with Bay County and the Bay County Court?

A Somewhat, yes.

Q And the Bay County court system?

A Somewhat.

Q And in fact any members of your family ever worked in Bay County?

A Yes, I'm actually - my family is from Marianna, which is Jackson County, right nearby, and my grandmother was a court reporter for this whole circuit for many years and my mother also was a legal secretary in this circuit.

Q Let's see. And prior to November of 1986, had you ever heard of Judge Turner?

A Yes, I had. But through my mother and my grandmother, who actually thought he was just a wonderful, adorable person. My grandmother kind of thought of him as one of her pets and she was the court reporter on the Gideon case, which Mr. Turner was the attorney and after it came back down. Yes, I knew him, I know of his reputation..

Q Okay. Did there come a time in November of 1986 when you were working at CCR and you learned that one of the clients of CCR as well as my client Mr. Steinhorst, a warrant had been signed for his execution?

A I remember that very well. That was a shock to all of us.

Q And did there come a time following learning that when you were involved in a telephone conversation conference call with among others myself?

A Yes. I believe - I think that you called us to tell us that you had gotten this phone call from a reporter and that was the first that any of us heard that there was a warrant for Mr. Steinhorst' execution. And we had a telephone

conference call with you, you were still in New York at that time. And we were all shocked, we couldn't believe that this had happened, we couldn't figure out how it had happened, and that's when we became aware that apparently the 3850 had been denied. We were not aware of that until that time.

Q And were you then instructed to go to Bay county and examine the court records in the Steinhorst/Sandy Creek trial among other things to attempt to find this order and find out what he said and what he had done?

A Correct. We were talking among ourselves, but we needed to get this order, we needed to see what he'd done, we needed to see what else he may have done in this case, because that was the first time, as you said, that we became aware that Judge Turner was even involved in the case.

Q Will you describe to the Court what you did in connection with that instruction.

A It was November 8th of 1986, I came to the Bay County Courthouse and I located the criminal division of the clerk's office. I went there and I talked to a woman at the counter and I talked to a woman there and the name plate on her desk said "Dawn", and I asked her for the Walter Steinhorst/Sandy Creek file. And I remember that she told me they were a mess and she didn't know what I would be able to find and she said that there had been a dozen phone calls about this case the day before, when the warrants had been signed.

Q Did you proceed to examine the files that she brought you?

A Yes, she brought out one box of files and put it in a - at an empty desk near the back of the room and she told me that I could look through them then. She asked me what I was looking for and I told her that I was looking, you know, I didn't know what we were looking for at that time, so I told her

I was looking for anything. And she handed me a copy of the order, the order denying the motion and said here's that order that everybody's been looking for. And she gave me a copy of that order at that time.

Q Now, besides the order, did you go through the rest of the files that she presented you at that time?

A I went through every page of that file. There was one box of files that she gave me and I looked through every page. I didn't read every single word on every page, but I looked through the complete file.

Q Did you notice at that time that the trial transcripts for the underlying criminal trial seemed to be missing?

A I thought that was - yes, I did.

Q And at that time did you see either Defense Exhibit 1 or Defense Exhibit 2?

A (Examining papers) No, I did not.

Q At the time that you went to Bay County to examine the records and to find Judge Turner's order among other things, were you aware of my concerns and the concerns of the other attorneys at CCR concerning Judge Turner and whether or not he would be a good judge for Mr. Steinhorst?

A Well, I was aware of that not only through that, but also through my personal knowledge of Judge Turner. Because I knew his reputation, I knew that this was not a judge that we would prefer to have hearing the case. And you had also expressed those concerns.

Q Now, did you ask this person whose name you believe was Dawn because she had a nameplate if in fact she

had given you all the files relating to Sandy Creek criminal trials?

A I had asked for all of the files. And she brought me a box of files and I said are these the files, and she said yes.

Q And --

A But it concerned - the lack of transcripts in there concerned me.

Q Okay. Did you become aware that subsequently another paralegal investigator was sent to examine those files?

A Yes. Later that month Paul Harvell said - it was another investigator at CCR, came down here because we had discovered that - I can't remember exactly the sequence of events, but I believe that we had discovered that the transcripts and the record were at the Florida Supreme Court and he came down here so to confirm that they were not here.

Q And did he ask to see the files again?

A Yes.

Q And how do you know he asked to see the files again?

MR. PAULK: Judge, I'm going to object. I know this is an evidentiary hearing, but let me for purposes of the record object to the hearsay. I don't think Mr. Harvell is here to testify, and I would object on the basis of that.

THE COURT: As to the last question I'll sustain the objection, as I think he said how did Mr. Harvell do something, and I'll sustain that objection.

Q (Mr. Alexander continuing) okay. Did you ever learn from any source in November that this order by Judge Turner recusing himself from the Charlie Hughes case had ever been signed or Judge Turner's involvement in the Charlie Hughes case?

A No, I did not.

Q Okay. When was the first time that you learned about Judge Turner's involvement in the Charlie Hughes case?

A In September of 1991. I was working at the Volunteer Lawyers Resource Center when Ms. Jacobs and Mr. Haigler came and re-examined the files. And that was the first time I knew of it.

Q Okay. Is it fair to say that given your training and background as well as your knowledge of the case and events in November of 1991, had you seen or been presented with either Defense Exhibit Number 1 or Number 2 and see Judge Turner's name, that they would have been meaningful to you?

A Yes. I believe that would have struck a bell with me and I think that I would have noticed that and brought that to the attention of my supervisor and you.

MR. ALEXANDER. I have no further questions.

CROSS EXAMINATION BY MR. PAULK:

Q Ms. Cox, my name is Alton Paulk. If you don't understand my questions, ask me to repeat them. Could I have just a second, Judge?

You indicated that you talked to a person by the name of Dawn. She gave you one box of files?

A Yes.

Q Is that all the files she gave you, was one box?

A Yes.

Q What did you ask this person for?

A I asked her for the - I don't remember exactly, either the Steinhorst or the Sandy Creek files. I remember that during the conversation both of those - those terms were used interchangeably, in the courthouse.

Q Did you ask for the box of the exhibits for Sandy Creek case?

A I asked for anything on the Sandy Creek/Walter Steinhorst case.

Q And she told you she had given you everything.

A Yes.

Q Okay. She also indicated to you newspapers had also requested to see the Sandy Creek files also.

A She told me that - said there had been quite a few calls. I also talked with another woman at the clerk's office, Patty Smith, who also told me that there had been a dozen phone calls and - that day and the day before.

Q Do you recall Patty Smith bringing you a bunch of boxes or files, I won't put words in your mouth, but boxes and let you go through them back in one of the rooms downstairs?

A I did not go downstairs.

Q When I say downstairs, first floor.

A Oh. She - I was brought a box of files. That's the only thing that I recall.

Q Do you recall where you looked at this box of files?

A There was a table in the back of the room.

Q Do you recall what room in the courthouse? You're apparently familiar with this courthouse, do you recall which room it was?

A It was in the clerk's office, the civil - the criminal division of the clerk's office.

Q Criminal division of the clerk's office.

A I don't remember the number.

Q And this was in November of 1986.

A Yes.

Q Do you recall when you went through the file, what type pleadings did you see in these files?

A I remember the order denying the 3850. I don't remember specifically that many things that I saw.

Q Okay. Did you - do you recall seeing orders in there, signed orders by judges?

A I don't recall.

Q Do you recall seeing any indictments of the people that were involved?

A Probably, but I don't recall specifically.

Q You noticed that the transcript of the trial was not in the record here in Bay County that you looked at.

A Yes.

Q What else did you notice that wasn't in there?

A What did I notice that wasn't in there?

Q Yes.

A That's only thing I remember specifically.

Q Okay. Do you remember how many - do you recall the case numbers you were looking for? Did you indicate you were asking for a specific case?

A I don't recall that I asked for a specific case number, but I asked for the Steinhorst/Sandy Creek files.

Q Did you see any other of the defendants in that file other than Steinhorst?

A I was aware that there were other defendants, I don't recall specifically right now that there were things, but yes, I believe that there were other defendants.

Q My question, what about in the files that were given to you by the young lady by the name of Dawn?

A I don't recall specifically. Many of the pages had all four names listed, pleadings in this case.

Q Did you specifically ask for Charlie Hughes' file?

A I don't recall.

Q Do you recall ever seeing any of the documents in this box that was given to you of Charlie Hughes?

A I don't recall.

Q Have you looked at the files since 1986?

A No.

MR. PAULK: I don't have any other questions, Judge.

MR. ALEXANDER: Just briefly.

THE COURT: All right.

RE-DIRECT EXAMINATION BY MR. ALEXANDER:

Q Did you make any written record of your visits to Bay County in November of 1986?

A Yes, I did.

Q And in what form was that written record?

A I took, notes and then I made an affidavit based on those notes.

MR. ALEXANDER: I would like to have marked as the next exhibit, Your Honor, the affidavit of Christian G. Cox, sworn to on November 10th of 1986, which actually is filed in connection with the papers, was filed in November, 1986, and the State has foreign, I guess it's - well, it's part of the records in Bay County, whether it's a part of the records from what proceedings, keep using the same caption, so I guess it's part of the records of this entire proceedings.

THE COURT: All right.

MR. PAULK: (Examining papers)

THE COURT: While Mr. Paulk is looking at that can I clarify something with Ms. Cox?

MR. ALEXANDER: Certainly.

THE COURT: I was just looking at your experience on Exhibit Number 3. You state you worked for CCR from October of '85 to April of 1988.

THE WITNESS: Yes.

THE COURT: But I presume from your testimony that you continued to do volunteer work or were involved with CCR or this case after April of 1988?

THE WITNESS: That's correct.

THE COURT: Then you went on to work for Mr. Norton (phonetic) in April of '88, September of '88 then? CCR? September of '88, September of '89, and then the Volunteer Lawyer's Resource Center to July of '93, still being involved with this case.

THE WITNESS: Correct. But the Volunteer Lawyers Resource Center is actually the more or less local counsel at this time with Mr. Alexander.

THE COURT: Okay. That's what I wanted to clarify, because I wanted to make sure I'm reading this correctly.

THE WITNESS: Yes. I continued my involvement in this case. Since 1986, '85.

MR. PAULK: I have no objection, Your Honor, to the introduction of this as well as --

THE COURT: It will be marked as Defense Exhibit Number 4.

MR. PAULK: As well as her affidavit, and if you want to, I'll waive --

MR. ALEXANDER: Go into the record as the next one. Again, part of the files of this case and I guess the record --

THE COURT: I can take notice of the court files and . . .

MR. ALEXANDER: Assuming that all the court files can be found in our . . .

THE COURT: But it would be helpful --

MR. PAULK: I would move that that be stricken from the record, Your Honor, as being tacky, I guess, is the word.

THE COURT: All right. Don't know if that's a legal objection, but . . .

MR. ALEXANDER: Withdrawn.

THE COURT: Okay. This is Exhibit Number 4, and then you have another exhibit you say?

MR. PAULK: Yeah. this is the affidavit of Ms. Cox, dated April 22, 1993. I have no objection to that being introduced, if you want to. And if he doesn't I'll introduce it.

MR. ALEXANDER: No, we'll do it as the next one.

THE COURT: Be Exhibit Number 5.

MR. ALEXANDER: Did you have any further questions?

MR. PAULK: I have no further questions.

THE COURT: You may step down.

MR. PAULK: Could I see Defense Exhibit 3, again.

MR. ALEXANDER: Like to introduce as the next exhibit, again a affidavit signed by Paul Harvell on the 20th of November. Again, it was filed in these proceedings. Since One Of the issues is the due diligence, I was unable to locate Mr. Harvell, I don't know where he is since then, to bring him in to testify personally, but he did put an affidavit in these proceedings, State has had since November of 1986, Which reflects his coming over here to examine the files. And again, it's the - it's in the proceedings and I guess you could take judicial notice of it anyway.

THE COURT: Any objection?

MR. PAULK: It's part of the public records, I have no objection, Judge.

THE COURT: Okay. It will be marked then as the next defense exhibit.

MR. ALEXANDER; That will be 6.

At this point, Your Honor, I would call Ian Haigler to the stand.

THEREUPON

IAN HAIGLER

being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. ALEXANDER:

Q Mr. Haigler, would you state your full name for the record.

A Ian, spelled I-a-n, Haigler, H-a-i-g-l-e-r.

Q And by whom are you employed?

A The Volunteer Lawyers Resource Center in Tallahassee.

Q And where do you reside?

A In Tallahassee.

Q and what is your Position at the Volunteer Lawyers Resource Center?

A I'm a paralegal.

Q And for how long have you been a paralegal with the Volunteer Lawyers Resource Center?

A I began working there in '89 and I believe in later '90 or early '91 I became a paralegal.

Q And as part of your duties as paralegal for the Volunteer Lawyers Resource Center, are you instructed to examine court files and court records in connection with their representation of death row inmates?

A Yes, I do.

Q And have you been involved in working and assisting me in connection with Mr. Steinhorst' post-conviction proceedings?

A Yes, I have.

Q And did there come a time in September of 1991 when you were instructed to go to Bay County and examine the court records concerning Mr. Steinhorst' case?

A Yes.

Q And did you come to Bay County to look at those records?

A I came to Bay County once without Ms. Jacobs and I don't recall exactly what the circumstances surrounding the records. I had originally requested that the complete file regarding Sandy Creek, that includes all of the other defendants as well, be copied and the clerk's office said that the records were too substantial for that and the cost would be great and that they really didn't want to have to copy them again because they had several times before. And so - or they said that I could come and copy the files myself and we arranged that they would charge me a little less per copy if I did that. And I came, but I don I t think I began copying anything the first time. And then the second time I came with Ms. Jacobs too.

Q And that was when did you come with Ms. Jacobs?

A That was in September of '91.

Q Okay. And can you describe what happened when you came to Bay County in September of 1991 with Ann Jacobs?

A We came and requested all the records relating to the case and they brought - I recall because of the way the boxes were stacked, there were five boxes, and there were some large rent row (phonetic) recording file folders that weren't in a box, and those were the original materials that we looked through.

Ms. Jacobs believed that there were more records that weren't there.

MR. PAULK: I'm going to object to that, Your Honor. That's absolutely total speculation based on hearsay.

Q (Mr. Alexander continuing) Well, did Ms. Jacobs say anything to you at the time?

A Yes, she did.

Q What did she say?

MR. PAULK: I'm going to object to that on the basis of hearsay.

MR. ALEXANDER: He can testify as to what she said. For purposes of this hearing and in acting upon it as supposedly truthful.

THE COURT: Based upon what she said you can testify what you did. (Inaudible words) - go from there.

MR. ALEXANDER: Well, he needs to state what he heard her say so he can tell you what he did.

THE WITNESS: Ms. Jacobs indicated to me that she believed there --

MR. PAULK: Still object, Your Honor. That's the same way of saying hearsay, introducing hearsay.

THE COURT: That's true. I will sustain the objection and I think he can go ahead and --

Q (Mr. Alexander continuing) What did you do as a result of what Ms. Jacobs said to you?

A Apart from her I continuously requested that the people in the clerk's office for more material. They were very friendly and helpful the entire day that we were there and

continuously looked. Very late in the day they did in fact find more records. And bring them to us.

Q And did you stay after hours?

A Yes, we did. They said that we could stay for a while afterwards looking at the records.

Q Now, you said initially they brought you some boxes and materials.

A Initially, yes.

Q And that was in response to your request that everything relating to the Sandy Creek murder trials be brought to you?

A Yes.

Q And did you specifically, do you recall stating to the clerk the names of the defendants?

A Yes.

Q And did you include Mr. Steinhorst?

A Yes.

Q Mr. Goodwin?

A Yes.

Q Mr. Capo?

A I don't recall

Q Mr. Hughes?

A Yes.

Q And Mr. - (inaudible word). Now, and then after they brought you what they said were all the files, you asked for additional files to be brought to double check?

A Yes, I did.

Q And did they bring you additional files?

A Not until much later, until late in the day.

Q Late in the day did they bring some additional files?

A Yes, they did.

Q Did you examine those files?

A I did not personally examine the files.

Q Ms. Jacobs examined that file?

A I assisted with some aspects of the examining them and I was also taking items one at a time as they were handed to me to be copied.

Q Do you recall - I show you Defense Exhibit 1 and 2. Did you see those, either of those two documents in September of 1991?

A (Examining) Yes, I did.

Q And were those documents in the files that were originally brought to you and Ms. Jacobs?

A No, they were not.

Q Were those documents found in the files that were brought to you later in the day after you had made numerous requests to see if there were additional files?

A Yes.

MR. ALEXANDER: I have no further questions of this witness at this time.

MR. PAULK: I just have a couple, Judge.

CROSS EXAMINATION BY MR. PAULK:

Q The period of time that you examined the files in Bay County, that was in 1991?

A Yes, sir.

Q You did not make any examination prior to 1991?

A No, I did not. I . . .

Q All right. When you - do you recall when you looked at the case of, the Bay County cases in the clerk's office in 1991, do you remember how they were arranged at that time in 1991?

A Yes, I remember they were very sloppily arranged.

Q Sloppily arranged?

A We were told by the clerk's office that they were in very messy shape and they were . . .

Q This is in 1991.

A Yes.

Q And did you find them in that condition?

A When they were brought to us they were in very messy condition.

MR. PAULK: I don't have any other questions of this witness, Judge.

THE COURT: Okay. You may step down. Unless you want to ask some more questions.

MR. ALEXANDER: I have none.

THE COURT: You may step down.

THE WITNESS: I did want to mention, sir, that --

THE COURT: I'm not sure if you need to ask Mr. Alexander before you offer something.

MR. ALEXANDER: If he has something that he feels that he needs to say to make his testimony --

MR. PAULK: I --

MR. ALEXANDER: -- I have no objection.

MR. PAULK: I would object to it, Judge, because I absolutely have no idea what he's fixing to volunteer. I can't object to his question.

THE COURT: I'll ask Mr. Alexander to talk to him and see what his --

MR. PAULK: If you want to talk to him --

MR. ALEXANDER: Yes.

(CONFERRING WITH WITNESS)

MR. ALEXANDER: The witness notes and I reflect the record that I had introduced him as Paul Harvell as opposed to Ian Haigler. And just wanted to make the record clear. He is Ian Haigler and not Paul Harvell.

MR. PAULK: I wrote it down that way.

MR. ALEXANDER: I apologize.

THE COURT: Okay.

MR. ALEXANDER: I call as next witness Ann Jacobs.

THEREUPON

ANN JACOBS

being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. ALEXANDER:

Q Will you state your name for the record?

A Ann Faith Jacobs.

Q And where do you reside, Ms. Jacobs?

A Tallahassee, Florida.

Q And by whom are you employed?

A The Volunteer Lawyers Resource Center.

Q What is your position with the Volunteer Lawyers Resource Center?

A I'm a staff attorney.

Q And you're an attorney licensed to practice law?

A Yes, I'm licensed in the State of New York, I was admitted in 1987, graduated in '86, and I have taken and passed the Florida Bar exam and my application is pending.

Q Okay. And can you tell me what, describe briefly for the Court what the Volunteer Lawyers Resource Center is?

A We're an agency that is a non-profit agency that's primarily federally funded with some state funding from the Florida Bar Foundation and we're basically like the federal counterpart to CCR. We help recruit volunteer lawyers to take post-conviction death penalty cases for defendants who can't afford attorneys and then we lend our expertise and our resources and assist the volunteer counsel in preparing post-conviction papers.

Q Now, is the Volunteer Lawyers Resource Center also help get volunteer lawyers from out of the State of Florida?

A Yes, we recruit from all over the country.

Q And do you provide special assistance similar to local counsel for such out of state lawyers?

A Yes. We don't act as counsel of record, but we do assist and we help investigate since we're local and we help file papers and whatnot. Sometimes, very rarely, we represent directly, but generally not.

Q And have you been involved in Walter Steinhorst post-conviction proceedings?

A Yes, I have.

Q And in September, 1991, were you involved with Volunteer Lawyers in assisting myself in connection with preparing and filing his federal habeas?

A Yes. I had joined the VLRC in April of '91 and Walter Steinhorst was the second case that I had worked on there and I was told that your law firm was going to be preparing a federal habeas petition and that's when I began working on Walter's case, reviewing all the records and helping, assisting in preparing for federal habeas.

Q In connection with that preparation did you determine to go to Bay County and review again the records of Walter's case and what was known as the Sandy Creek trials?

A Yes, I did. That was essential. Normally we would get copies of all case files, any kind of case files relating to post-conviction proceedings and the record on appeal. we try to get every, literally every piece of paper on the defendant and relating to the case and because the files were so huge apparently we weren't able to copy them all, so I had to go personally and look at all the files, make sure that we weren't missing anything, before we filed the federal habeas.

Q And did you in fact go to Bay County in December of 1991?

A Yes, I asked Ian Haigler to go with me and we drove over and we went to the clerk's office and we asked to see all the files in the Sandy Creek case and they put us at a desk and brought out a bunch of files, there were several boxes, and I had specifically asked for files, you know, all the files on all the defendants because I could see by looking at them that there were separate files for Mr. Steinhorst' case and separate files for David Goodwin. There were also files about David Capo, who originally had been indicted for murder as well. So there were different groups of files, not in any particular order.

Q And after you reviewed the files did you reach any conclusion as to whether what had been brought to you initially in response to your request for files relating to all the defendants whether they were complete?

A Yes, I was concerned because I saw Mr. Steinhorst' files and Mr. Goodwin's files and some other files about these other co-defendants who ultimately did not stand trial for murder, but I didn't see any files on Charlie Hughes.

So I spoke to the clerk and I said are you sure that these are all the files because it seems that something is missing. She said yes, this is everything that we found. And I said, well, could you check again because I don't see any files on Charlie Hughes. And she said I'll check, but I'm pretty sure this is everything that we have. And so I just continued looking, there were a lot of files, and I just continued looking through them and copying things that I felt were important, asking Ian to copy, and then several hours later, as Mr. Haigler testified, towards the end of the day she came out with - I don't remember if they were Redwell (phonetic) folders, but they were some files on Charlie Hughes. And I went through those files and that's where I discovered this order entered by Judge Turner, the two orders entered by Judge Turner. one was an order indicating that he had advised counsel that he had recused himself from Charlie Hughes's when Mr. Hughes was on trial in 1981 and there was another order saying order of consolidation and reassignment to another judge. And that indicated that he was reassigning the case to I think it was Judge Bodiford. Apparently Judge Bodiford had - there were separate case numbers, he had one of the case numbers and Judge Turner had the other case number and so they were both consolidated and sent over to Judge Bodiford.

Q Okay. And let me show you what's been marked as Defendant's Exhibit 1 and 2. Are these the two orders that you're referring to?

A (Examining) Yes, they are.

Q And were those orders in the materials that had originally been furnished to you when you first came to the - and asked for all the files?

A No, they were not.

Q And did you specifically ask for all the files on all the defendants?

A Absolutely.

Q And you were told that you had been given all the files.

A Yes.

Q And then later some additional files were brought to you late in the afternoon.

A Yes. I think they said they found them downstairs, I don't know, but I doubted that they kept them in the basement or something and apparently and they went back and looked again and they found these additional folders and brought them up.

Q And it was in those additional folders that you found these two orders relating or signed by Judge Turner.

A Yes.

Q That's the first time that you were aware - strike that. You were aware that Judge Turner had handled the 3850.

A Yes.

Q Was that the first time that you were aware that Judge Turner had also been involved in connection with Charlie Hughes's case?

A Yes. September, '91.

Q And was that the first time that you became aware that he had represented the estate of one of the alleged victims?

A Yes. We didn't know which victim, so after I got back to Tallahassee I directed a law student intern of ours, John Bowman, to go to Bay County and go through the estate files and try to figure out which victim it was. And then he came back with the Sims case file. And that's when we got the estate file.

Q And following this discovery in September of 1991 of the, Judge Turner's recusing himself from the Charlie Hughes case, did you inform me of that fact?

A Yes, I called you as soon as I found out and told you what I had found and you expressed surprise.

Q And then subsequently did you assist me in preparing the motions that bring us to the proceedings today?

A Yes, I did.

Q And we filed those within a couple weeks of having discovered this?

A Yes. And we, as I said, we were working on the federal habeas petition and when we saw this we felt that we better file something to alert the court to this and we ended up filing both things pretty much simultaneously.

MR. ALEXANDER: I have no further questions.

MR. PAULK: Just a couple.

CROSS EXAMINATION BY MR. PAULK:

Q Ms. Jacobs, your examination of Bay County files was done in 1991; is that correct?

A Yes.

Q You had not examined any of the files prior to 1991, specifically between the time of 1986 to 1991?

A No, I wasn't even in Florida until 1991.

Q Okay. In 1991 when you examined the files, did you find the files messy and in disarray, in disorder?

A Yes, they were unbelievably messy. It was very disorganized. Some were bound, some were - there were loose papers. The thing that really struck me was the evidence box. They brought that up from the basement and it was - things were just thrown in there and there was evidence missing and whatnot.

Q My concern is not the evidence box, but the files, the pleadings. They were messy and in disarray.

A Yes, absolutely.

MR. PAULK: I don't have any further questions of this witness, Judge.

MR. ALEXANDER: I have no further questions.

THE COURT: You may step down.

MR. ALEXANDER: We have no further witnesses.

THE COURT: Mr. Paulk?

MR. PAULK: State calls Gloria Tharpe.

THEREUPON

GLORIA THARPE

being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. PAULK:

Q Ms. Tharpe, if you will, tell us your full name for the record, please.

A Gloria Beth Tharpe.

Q And where are you presently employed?

A Clerk's office in Bay County.

Q Okay. And you're employed for Harold Bazzel?

A Right.

Q When did you first become employed with Harold Bazzel, the Clerk of the Circuit Court for Bay County?

A January, 1985.

Q January, 1985. Okay. Your duties in January of 1985, what were they, as an employee of the clerk's office?

A Primarily assigned to Judge Turner's division.

Q All right. And for the record, if you would, explain Judge Turner's division. How were the courts broken down, the judges broken down?

A They were in A, B, and C Divisions. Each judge had a clerk assigned to his division that took care of his files, I went to all hearings.

Q All right. So when you went to work in January of 1985 you were Judge Turner's for all practical purposes criminal clerk.

A Yes.

Q And I believe - when was it or if you can recall any dates, when was it that you first became involved in the Steinhorst 850 hearing? Your first recollection of it.

A I think '87 is when we had that hearing, in '87, I think.

Q Okay. Let me see if I can help refresh your recollection. Do you recall when Mr. Steinhorst's death warrant was issued and there was a hustle and bustle for an appeal?

A Yes, I do. That was in '86. Right.

Q All right. And did you - your duties as clerk for the judge, when there is an appeal, you get involved in preparing the record on appeal.

A Yes, I do.

Q All right. And basically what is the record on appeal, so we can make a distinction between the trial transcript and the record on appeal?

A It's the pleadings that are filed in the case that the attorneys request to be included in that record.

Q Okay. And that is the record on appeal.

A That's the record on appeal.

Q Now, the trial transcript, what is that? Is that something separate and apart?

A That's right. That's the transcript from the court reporters and they're labeled as Volume I, Volume II, Volume whatever, and then our transcript would be the following volume after that, after the last transcript.

Q Now, the transcripts of cases that have been appealed, as Bay County clerk, is it customary for y'all to maintain and keep trial transcripts after they've been taken on appeal?

A There is normally a copy of that - the transcript - the record, I'm sorry, not the transcript, the record, there's a copy of the record kept in the file. The transcripts go to the Supreme Court or to the District Court.

Q All right. And you say when a file is maintained or when the record of appeal is sent up, the clerk's office here keeps a copy of the record on appeal.

A They keep the original, I'm sorry, they keep the original record and a copy with the certification from the clerk is sent to the appeal court, I'm sorry.

Q So the original document is still maintained in the Bay County Clerk's Office.

A That's right.

Q Okay. Now, the transcripts, are they customarily returned and stored with the clerk's office or do you know what happens to transcripts after they are sent to the Supreme Court, transcript of the trial?

A When I was still in the felony division the beat I can remember, sometimes they were and sometimes they weren't. It could be years before they were returned.

Q Okay. Now, let's go back, you prepared, I believe, the record on appeal for the first denial of Mr. Steinhorst's 850 motion; is that correct? The one where - the emergency.

A Yes.

Q And there was some specific reason you recall having that record on appeal, preparing that record on appeal?

A I just remember it was late in the day and it was an emergency, it had to be done then.

Q Okay. And did you work over the weekend?

A Local thing. It seems like I did. Maybe I just remember the hustle, bustle, hurry thing. I don't remember - I think I might have had to work late that night to do it.

Q To get it done. All right. Now, after - well, let's go back to the time period, do you recall a time when - you remember Patty Smith.

A Yes, I do.

Q She - what was her position back then in 1986?

A She was the supervisor in the criminal division.

Q Okay. And do you recall an occasion when some people asked her for some records of the Steinhorst or Sandy Creek case?

MR. ALEXANDER: Objection, Your Honor. Hearsay.

THE COURT: That particular question you can answer.

THE WITNESS: Yes, I do.

Q (Mr. Paulk continuing) Okay. And do you recall the people that she had given the records to?

A No, I don't. I just know they were some people that had come in and asked for the files and I remember her looking for it.

Q Okay. Was this before you had the hustle and bustle in preparing the Steinhorst appeal?

A It was.

Q Okay. And do you recall how many boxes were furnished to these people?

A No, I don't.

Q Do you know where these people were when they looked at the files?

A The occasion that I remember, they were taken to the - to what's now the recording department and to a table back there. At that time our offices were very small or combined into two rooms and we were just shoved tight in a tiny room. And she took them to the recording department where there was a table.

Q Now, when you - at that time you had not, you had not been given custody or working with the files.

A No, I hadn't.

Q About how soon after that was it that you started working with and gathered up files and worked with the files?

A My first recollection was in '86. We were in another room at that time.

Q And that was preparation for that speedy appeal.

A Right.

Q Okay. Now, when was the next time that you became involved with the files and the records, for the purpose of this question right now, with the Sandy Creek murders, the next time?

MR. ALEXANDER: Objection. I don't know if she knows what the, what she includes in the Sandy Creek murders.

Q Well, I'll rephrase the question. When is the next time you became involved with Walter Steinhorst file?

A We had a hearing in '87, I think. September of '87.

Q And I assume - well, prior to that hearing in September of '87, I think that's probably roughly the month we're talking about, did anyone come in and review the files prior to that time?

A There was always someone looking at the files.

Q And when you got a hold of these files in September of 1987, where were they located?

A At that time our files were kept in a what's called the file room, where all our older files are kept now.

Q Okay.

A It's next to the criminal felony office.

Q Okay. And did you gather up these files in that felony file room, which is right there on the first floor next to the clerk's office; right?

A Right.

Q And was that in preparation of the September, 1987 hearing?

A Yes, sir.

Q Do you recall what all the files consisted of then, just generally? How were the files and how were they arranged?

A They were kept in cardboard boxes like they are now. I don't remember if there was one or two boxes, I don't know. Things were just stacked in there. We had to go in periodically and file paperwork.

Q Okay. Now, I believe one of the individuals that indicated - well, let me see if I can't do this way. We have here three boxes on this cart here.

A Um hum.

Q Prior to today have you gone through and examined them and looked at these?

A Yes, sir.

Q Okay. Now, let's go to 1987, Steve Alexander was the attorney at those hearings; right?

A Right.

Q And you were present during the taking of evidence on Mr. Steinhorst's case; is that correct?

A Yes.

Q And the files that you would bring to that hearing, the Steinhorst files, were they consisted of what we have here?

A Right.

MR. ALEXANDER: Objection, Your Honor. Want to object to this vague reference to what we have here. Because there's three boxes there and I don't know whether that encompasses every paper that's ever been filed by every defendant and every attorney in all of the proceedings, post-conviction or not, or, you know, there's no identification of these three boxes and what they are for purposes of any kind of appellate record or here.

You know, just three boxes. And there's been no representation nor any evidence as to what those three boxes are and what they include.

MR. PAULK: All right, Judge, let me back up and clarify.

THE COURT: I'll sustain the objection for the record.

Q (Mr. Paulk continuing) Okay. Ms. Tharpe, if you would, step down, please.

A (Leaving witness stand)

MR. PAULK: And, Judge, I honestly don't know how we're going to do this for purposes of record. I would like to identify, I guess, these State's exhibits as we go through them. State's Exhibit Number 1. Could we mark that. Okay, you see this box here?

THE WITNESS: Yes.

Q (Mr. Paulk continuing) And the handwriting on that?

A That's mine.

Q That's your handwriting? Now, that's the State's 1.

THE COURT: State's 1, just stick a marker on it so we've got some identification.

MR. PAULK: Yes.

THE COURT: Show for the record it's a cardboard box, it has "77-708, Sandy Creek. Walter Gale Steinhorst" in handwritten, black Magic Marker.

MR. ALEXANDER: Are you just marking the boxes of exhibit or the entire contents of the boxes?

MR. PAULK: I'm not marking the box and the contents of the exhibits.

THE COURT: We'll mark it for identification at this point in time and we'll try to identify what's in the box if we can go a little further, as a Composite 1. Are you going to do the same thing with the other boxes?

MR. PAULK: Yes, sir, Judge, I don't know of any other way.

THE COURT: The other box, we'll go through the contents, but specifically the record, the box itself has Magic Marker "Sandy Creek. David Monroe. Goodwin. Charlie Hughes. Lloyd Woods. David Capo. Peter Van Estrup. And John Does." Handwritten on the lid of that cardboard box. Again, that would just be the box itself.

MR. PAULK: Okay. And, Judge, well, we'll do these as State's Exhibit Number 3.

THE COURT: And that . . .

MR. PAULK: Composite exhibit.

THE CLERK: File Number 2 and File Number 1.

THE COURT: For the record, that would be blue file folders that have "Walter Gale Steinhorst" handwritten felt marker, File Number 2 and File Number 1, two blue folders. And the last is a . . .

MR. PAULK: Is a box, Your Honor, and it is marked State's Exhibit Number 3, State versus Walter Steinhorst, 77-708, with the initial G and the last name Tharpe on it.

THE COURT: it's apparently evidence sticker. Does it have a date?

MR. PAULK: Yes, September 18, 1987.

THE COURT: September, 1987. I'm trying to think of the dates.

MR. PAULK: That was - these were exhibits that were introduced in evidence in 1987 at the evidentiary hearing that started September 16th and ended, I believe, on the 18th.

THE COURT: So with that box we can assume the evidence was presented at the evidentiary hearing --

MR. ALEXANDER: I don't know what it contains, it's got a label on it.

THE COURT: But we'll show it as State's Exhibit Number 4 for identification at this point in time.

MR. PAULK: Thank you.

Q (Mr. Paulk continuing) Now, let's go to State's Exhibit Number 1. On top of that box, Case Number 77-708. Says "Sandy Creek, Walter Gale Steinhorst."

A That's right.

Q Is that your handwriting on that box?'

A That's my handwriting.

Q Okay. Let's go to File Number 1 and File Number 2, which is State's Exhibit Number 3 for identification and let me show you that. It has "Walter Gale Steinhorst, File Number 1" Whose writing is that?

A That's mine.

Q And let me show you "Walter Gale Steinhorst, File Number 2," which is part of that composite Exhibit Number 3.

A That's mine.

Q That's your handwriting?

A Yes.

Q Now, let's to State's Exhibit Number 2. On the top of this it says "Sandy Creek, David Monroe Goodwin, Charlie Hughes, Lloyd Wood, David Capo, Peter Van Estrup, and John Does." Do you recognize that writing?

A Yes.

Q State's Exhibit Number 4, with the "G. Tharpe" on it, being marked as State's Exhibit Number 3, dated September 18, 1987. Whose handwriting is that?

A That's mine.

Q Okay. Now, if you would go ahead and take the stand.

A (Returning to witness stand)

Q The files that you received, and we'll call them Sandy Creek, they're labeled Sandy Creek and there are different names on them, the files that you had received for the purposes of hearings back in September of 1987, are those the records that you had in 19 - at least September of 1987, when we were having a hearing?

A Except for the evidence box there. I received that in that hearing.

Q Okay. And I believe there is a transcript of the appeal of that hearing that's been added to the box.

A I don't know.

Q (Examining contents of box) And the box I'm referring to is State's Exhibit - it's going to be State's Exhibit 1. Sandy Creek, Walter Steinhorst. And the record on appeal I'm referring to is Volume 1, 3, 6, and there's some more in here.

A Yes. These came out of the Supreme Court, District Court.

Q My question is this.

MR. ALEXANDER: The record on appeal, referring to which record on appeal, because there's been more than one record on appeal here.

Q If you would, look at the index on it.

A (Examining) Index?

Q Yes.

A And what was your question again, I'm sorry?

Q All right. There, are some 1986 documents, when was this record on appeal? When would it have been prepared or one like it?

A It was prepared by myself in November of 1986. November 21st, 1986.

Q Okay. And was that in, or if you can recall, was that in the file when we came back in 1987, the records on appeal that we've got there, the volume?

A I don't recall.

Q Now, in 1987, when you got the Steinhorst file, if you would, explain to the Court how they were maintained and how objects were filed on those.

A In '87?

Q Yes. In '87, in September of '87.

A Everything was put in the box. I mean if we filed something we would just put it in the box. I don't think it was in any real file folder or anything. It was - it was a confusing file at that time.

Q Okay. This is in 1986, or in September '87.

A Right.

Q Okay. In that file how - the defendants, were they separated out?

A No.

Q Okay. The file folders. Do you recall what type file folders were used back then?

A They were a manila color.

Q Okay. And the pleadings, were the pleadings kept in manila folders?

A Yes, sir.

Q Okay. And when I say the pleadings, we're talking about orders, indictments, motions, and that sort of stuff.

A Right.

Q Okay. And when you got the file in 1987, were they still in the folders?

A Right.

Q Okay. Now, the - and I'm not sure if I asked you this question, I'll apologize if I already have. Were the files separated or segregated by defendants' names at all?

A No.

Q So if you went through the files in1986 or at least in 1987, when you got them, You would have to go through the entire voluminous file to separate Charlie Hughes' case from Mr. Steinhorst's cases. Is that true?

A That's right.

Q All right. Now, the exhibits, State's exhibits which you have previously identified in front of us here,

bearing your signature on the boxes and the files. When did you do that?

A The last contact I had with the case was in 1988 at the last hearing we had. I don't remember what the hearing was, I guess 3.850 hearing and there was an appeal to that denial and I was preparing the records for the appeal. I talked to my supervisor at the time and we kind of talked it over and decided that maybe it would be better if we divided out the - the defendants by name and put their paperwork in separate files, since there was no activity in no one's but Mr. Steinhorst and Mr. Goodwin's cases.

Q And that's what you did.

A And that's what I did.

Q And that was in 1988.

A Right.

Q And that, so that I can understand, in1987 all the defendants were grouped in to manila file folders and in boxes.

A Right.

Q So if you asked for the Walter Steinhorst file, you've also got Charlie Hughes' file, Mr. Estrup's or these other co-defendants' files.

A Right.

Q And when you have to prepare the record on appeal after Judge Turner denied it at the full evidentiary hearing in 1988, you organized the files as they are today.

A Right.

Q And the documents in these files as they are today were there at least in '87 or '88 when you did them; is that correct?

A That's right.

Q Now, after '88, if you came in and asked for a particular defendant's file, then what would you get? If you asked for Walter Steinhorst's file, what would you get? If you just asked for Walter Steinhorst.

A You would probably just get that box.

Q And if you asked for Charlie Hughes' file - and the box I've shown you we referred to as State's Exhibit Number 1.

A Right.

Q Which would have then included these two files, okay, which are State Exhibit 3, I think. Now, State's Exhibit 2, if you had asked for Charlie Hughes' file in '88, what would you have got?

A That box.

Q Okay. This box being State's Exhibit Number 3, I believe - State's Exhibit 2. Okay. Which includes who else's file?

A David Goodwin's, also David Capo, Peter Van Estrup, and John Does.

Q Now, when in '88 did you organize the files in this manner? Talking about in what month.

A In August.

Q All right. And after August of '88 you or when were you transferred to another section or made supervisor of another section?

A June, 1989.

Q Okay. All right. Now, inside the box, State's Exhibit Number, that is marked Charlie Hughes along with David Goodwin and others, let me show you these files which were marked Charlie Hughes 1 and Charlie Hughes 2. Do you recognize the writing on those files?

A Yes, I do.

Q Okay. And it's your writing, I believe.

A Yes, it is.

Q These two files you reorganized in1988?

A That's right.

Q Okay. And you took - let me ask, the, all of the Charlie Hughes pleadings that you had found in the record at least when you took control of them or saw them in 1986, did you include those in the records that you found in --

MR. ALEXANDER: Objection to the question. It's leading.

MR. PAULK: All right.

THE COURT: Rephrase your question.

Q (Mr. Paulk continuing) What did you do with the pleadings that you found in the Charlie Hughes, David Goodwin, Walter Steinhorst file, Lloyd Woods file and David Capo file, Peter Van Estrup file, and the John Does file, what did you do with those pleadings?

MR. ALEXANDER: Object to the question. There was no such separate file at the time prior to reorganization. He's referring to something that didn't exist.

MR. PAULK: My question is simply what did you do with the conglomerates of all of the defendants' files in 1987, the pleadings.

THE COURT: I note the semantics of what's involved, but I think she can answer the question. Okay.

THE WITNESS: I separated out by defendant. If it said Charlie Hughes on it, I put it in Charlie Hughes' file.

Q (Mr. Paulk continuing) Now, if you will, we have them, I believe, marked and in Charlie Hughes' file two... Or I just request - well, if you would, prior to today you marked these orders; is that correct?

A Yes.

Q Okay. And in Charlie Hughes' file, number two, does the order of July, 1981, of Fred Turner recusing himself appear there?

A Yes, it does.

Q And the file date of that order?

A The date he - from the clerk's office?

Q Yes.

A July 9th of 1981.

Q Okay. And contained also in this same Charlie Hughes file Number Two that you reorganized, do you see Judge Turner's order consolidating Case Numbers 77-708 and 77-711 and again recused himself?

A Yes, I do.

Q What is the file date marked on that as being filed in the clerk's office?

A July 15th, 1981.

MR. PAULK: That's all the questions I have of this witness at this time, Your Honor.

MR. ALEXANDER: Why don't you leave that up there.

MR. PAULK: Excuse me, let me ask this question. I'm not sure.

Q (Mr. Paulk continuing) Did you have any contact with anybody as to these files in 1991, who might have come in and requested these files?

A No, sir.

Q The files I'm referring to are the ones that have been marked for State's exhibits.

A No, Sir.

MR. PAULK: Yes, I have no more questions.

THE COURT: You may proceed.

CROSS EXAMINATION BY MR. ALEXANDER:

Q Now, Ms. Tharpe, you were first employed with Bay County in 1985?

A That's right.

Q And you were employed as the clerk for Judge Turner's division?

A Right.

Q Now, prior to 1986, when the warrant was signed, did you ever have any occasion to look at the Sandy Creek files?

A No, I did not.

Q Did you have any responsibility prior to that time for providing files relating to Sandy Creek, and I'm using Sandy Creek relating to all the defendants and all, in the broadest sense, providing files related to that to any attorney representing Mr. Steinhorst or any other defendants?

A I can't recall at any time unless someone was to come in and ask me for it. I was the clerk that was handling it at the moment.

Q Do you have any private recollection of every having presented files, Sandy Creek files, prior to 1986 to anybody?

A There was some gentlemen that came in and I worked with them locating the files at one time. I think they were from the CCR, but I don't remember what time that was, what time frame that was.

Q Do you have a memory now where you could swear to every piece of paper that you gave those people?

A No.

Q Do you know, sitting here today on the stand, whether or not every piece of paper that's been filed in connection with any one of these defendants in post-conviction

or any transcripts that are in those boxes, all the records are there today?

MR. PAULK: Stipulate she can't say that, Judge. I'm objecting to the materiality of it. Two we're involved in is the judge's recusal.

MR. ALEXANDER: My question is whether these files are as of today complete.

MR. PAULK: I withdraw the objection.

THE WITNESS: I'm sorry, would you repeat that --

Q (Mr. Alexander continuing) Can you state that in fact these files that you had some responsibility for maintaining that you've testified are in fact the complete files of every piece of paper that's been filed in connection with all Mr. Steinhorst's proceedings?

A I don't think I can swear that it's every piece of - it's the file that was kept in the clerk's office.

Q Have you done a complete search of all of the files - let me ask you this question. Have you ever in your experience in clerking with Bay County found that pieces of paper have been misfiled?

A Certainly.

Q Have you ever found that pieces of paper or files have been lost?

A Mislaid for a time, but found.

Q Found later. In fact has Bay County, has the clerk's office ever loaned out portions of the files to say the state attorney's office for a period?

A No, sir.

Q Never let anybody take the files out of the clerk's office.

A No, sir.

Q Have you ever personally conducted a complete search at any time from '86 to see if in fact all the files relating to Mr. Steinhorst and all the co-defendants have in fact been assembled?

A (No audible response)

Q I'm sorry. Is it your testimony that you just took whatever files were given to you?

A That's true.

Q All right. And I believe your testimony was when they were given to you that they were a mess?

A Yes, sir.

Q And that the filing system was just simply to put pieces of paper in a box?

A Somewhat.

Q And there weren't any labels on the box before you put the labels on them, were there.

A No.

Q Now, when you reorganized the files in '88, separated them out, did you read the pieces of papers?

A I would say I probably did somewhat. I went - I tried to go by the chronological order in putting them in the file.

Q And prior to that time they weren't even in chronological order, were they.

A Pretty much. It was a lot of activity in the file. Lot of people went through the file.

Q Lot of people, in fact you had to replace the file folders because I believe originally they were manila colored; right?

A Right.

Q . . . of the original file?

A On account of they were ripped.

Q Do you recall reading the two orders that have been marked as Defendant's Exhibit 1 and 2 that Mr. Paulk referred to about Judge Turner recusing himself?

A Back in '88?

Q Yes.

A I can't swear to that.

Q It didn't ring a bell?

A No.

Q In your experience, you were with Judge Turner for a long time, did he recuse himself from a lot of cases?

A In my experience he would announce from the bench to the attorneys that he might have represented a family member of someone, if they requested that be recuse himself be would.

Q And he didn't mention that to you or anybody else during the time period of Mr. Steinhorst trial, did he.

A No.

Q Do you have any personal knowledge of what files were shown to Ms. Cox, you were in court when she testified today; correct?

A Yes.

Q And prior to seeing her testify today, do you remember ever seeing her?

A No, I don't.

Q Do you have any personal knowledge of what files were shown to Ms. Cox when she came over here in September of 1986?

A No, I don't.

Q Did you ever meet a Paul Harvell?

A Yes.

Q When did you meet him?

A During the time that all the hubbub was going on I worked with him quite diligently, looking for the files.

Q You know specifically what documents were given to him?

A No, I don't.

Q Did you ever meet or see Ian Haigler or Ann Jacobs before today?

A. No.

Q Were you present when they were shown documents or files?

A No, sir.

Q And these are the Charlie Hughes files that you reorganized; right?

A That's right.

Q Put them in new file folders, so prior to 1988, August of 1988, these files were not maintained in this sort of order.

A No.

Q And I guess I'll bring you over the box that you put - let me ask you generally. When a - what is the file number on Charlie Hughes's case?

A 77-708.

Q Now, the first document that I note, and this is State's Exhibit - which one was this? Is this 4?

MR. PAULK: 2, I think.

Q 2. This came from 2. Charlie Hughes' file. What's the docket number on, the case number on that one, the first one that you put in there?

A 77-711.

Q It says 711. 1 thought you said it was77-708.

A They were all consolidated together, some of them to lower case numbers.

Q I see. So some materials would have 77-711 on them.

A Some materials would have 77-708 on them.

A That's right.

Q Some would have nine, ten, eleven. So until you organized them in '88 by defendant, they were just all thrown into a box.

A That's right.

Q Now, I'm not familiar with how Bay County keeps its records and, by the way, has Bay County changed the way in which it maintained its files from 1977 to today? Any changes in the court system, do you have like computers now or . . .

A We have computers. At that time I don't think they kept minute sheets. Back in '82 and '88. Or docket sheets into the files, they wrote on the outside of the files at that time.

Q When did they - do you have computer document system now?

A Right.

Q When did that come into being?

A (Inaudible words) - in 85.

Q In '85. Okay. Do you know how long before '85?

A I think it was relatively new at that time, it was probably there in '84, I think.

Q So it wasn't there in '81.

A I would assume not.

Q Okay. Now, under the procedures as you understand them that were in place say during the period from 1977, when the original indictment, that's when the original indictments were handed down? And that's why you got a "77" prefix?

A Right.

Q Were all papers that were filed in connection with the Court in that case to be put in files and maintained?

A Yes.

Q And that would include pleadings that were filed?

A That's right.

Q That would include orders?

A That's right.

Q That would include exhibits marked during hearings?

A Marked during hearings?

Q Yes. Any exhibits that were put into evidence marked during hearings such as this, would they be a part of the files?

A If it was marked as a current exhibit or marked into evidence it was put in the vault.

Q In the vault, but that's still part of the files; right?

A I don't consider it the file, but . . .

Q Part of the record of the proceedings?

A It's not kept with the file, no. If that's what you're asking me.

Q Bay County, I guess, different than - today is there any record of that maintained in this computerized docket sheet? Do you know where to go to get the evidence, if you want to get everything that relates to a case, is there a piece of paper that you can go to today that says, you know, this is where the pleadings are, this is where the exhibits are, this is where the transcript, is there such a thing in Bay County today?

A I don't know, I have not been in that department in over five years now. I don't know of any. There could be, I don't know.

Q Was there, more pertinently, was there any such special record in 19 - say for the period from 1980 through 1988, when you were involved in this case?

A No, not that I recall, no.

Q Now, I notice this is - is this the complete file for what you believe to be the complete file - let me put it another way. Is this all the materials that you were given in say '87 relating to Charlie Hughes?

A All that that I was given, I suppose, I mean this is what I made the files up in.

Q Everything you got had Charlie Hughes's name on it you put in there.

A Right.

Q Now, what did you do if there was more than one name on the caption sheet?

A I think I put it in the big, Steinhorst file. I think that's where, I can't recall.

Q Okay. Now, in our - in Charlie Hughes, I believe the record will reflect and State will stipulate, he was tried. Do you see any trial transcript there for Mr. Hughes' trial?

A I don't see any here.

Q Now, are they part of the file?

A If they're returned.

Q Well, returned from where?

A From the District Court or the Supreme Court.

Q Well, as I understand, you'll stipulate Mr. Hughes was tried right here in circuit court; correct?

MR. PAULK: Sure he was.

Q (Mr. Alexander continuing) So those transcripts should be here; right?

A When a record no appeal is prepared the transcript is sent either to the District Court or to the Supreme Court. We don't keep a copy of the transcript.

Q Do you know if in fact Mr. Hughes' trial was appealed to any appellate court?

A I don't know --

Q State will stipulate that he had a hung jury and then he entered into a plea. I know of no appeal to the court, do you?

MR. PAULK: I don't know. There would be no transcript either.

MR. ALEXANDER: What?

MR. PAULK: There would be no transcript either.

MR. ALEXANDER: Was any transcript ever prepared to your knowledge of --

THE WITNESS: Not to my knowledge.

Q (Mr. Alexander continuing) So the transcript isn't here.

A I don't see one here.

Q Okay.

A I can't swear to that, but I don't see one here.

Q All right. Okay. And the exhibits that were put into evidence in Mr. Hughes' case, they wouldn't be in these records either, would they. The records that are up here in the courtroom today.

A Exhibits? I'm sorry.

Q Exhibits that were entered or offered in evidence in Mr. Hughes' case.

A They would be kept in the vault.

Q Yes. And they're not a part of these records here that you put into evidence.

A No, sir.

MR. ALEXANDER: Okay. I have no further questions.

RE-DIRECT EXAMINATION BY MR. PAULK:

Q Just want to clarify one thing. The records that you inherited in 1986 when Judge Turner became involved in the case are the ones that you have incorporated in these files, State's exhibits.

A That's right.

Q All right. And for clarification. The transcripts on appeal, that is prepared and done by the court reporter, is it not?

A That's right.

Q And when you are forwarding a record on appeal do you - let me ask the question. Does the clerk's office have anything to do with the transcript on appeal?

A No, sir.

MR. PAULK: That's all I have.

THE COURT: If I could clarify one thing with Ms. Tharpe. When did you write on these boxes? Was it in 1988 or before 1988 when these boxes were put together so to speak, writing on it?

THE WITNESS: '88.

THE COURT: In 1988?

THE WITNESS: (Indicating in the affirmative)

MR. PAULK: She shakes her head in the affirmative.

THE WITNESS: Yes.

THE COURT: So in 1988 would be the date that the boxes as they exist right now were prepared.

THE WITNESS: That's right.

THE COURT: Yes. I'm sorry, Mr. Alexander.

MR. ALEXANDER: Yes, I have a couple of quick questions.

RE-CRQSS EXAMINATION BY MR. ALEXANDER:

Q Have these files that are sitting in the courtroom today that have been marked as State's exhibits been continuously in your sole possession since you got them in 1986?

A No, sir.

Q Have many people looked at them and examined them since 1986?

A Yes, air.

Q Can you sitting here today swear that every single piece of paper that is here today you got in 1986? Pieces of paper that you got in 1986?

A Can I swear what?

Q That every piece of paper that's here present today you had in 1986, when you first got whatever files you were given?

A No, I can't swear that. There's been a lot of pleadings filed since I left felony division.

Q In addition to the pieces of paper that have been added because they were created after and filed, can you swear that in fact every piece of paper that existed in 1986 you were given in 19 - when you first got the files in 1986?

A To answer your question, no, I don't think I could swear that. Because I don't know what every piece of paper that's in these files are.

Q And you don't remember every piece of paper you were given when you were first given the papers in 1986, do you.

A No, sir, it's a big file.

Q Right. And you don't know if in fact some of the pieces of paper that you were given in 1986 might have been lost, mislaid, between the time of 1986 and the present. Is that also a fair statement?

A I can't swear that, but I don't think so.

MR. ALEXANDER: I have no further questions.

MR. PAULK: I don't have any further questions of this witness, Your Honor.

THE COURT: Okay. You may step down.

MR. PAULK: One additional witness, Your Honor. Can I excuse her to go back downstairs?

MR. ALEXANDER: I don't, I mean if we need her I assume that she'll be available?

MR. PAULK: Yes.

THEREUPON

REENA GOSS BAKER

being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. PAULK:

Q Ms. Baker, if you would, tell us your name for the record, please.

A Reena Goss Baker.

Q And where are you employed?

A Harold Bazzel, Clerk of Court.

Q And that's here in Bay County; is that correct?

A It is.

Q And how long have you been employed with the Bay County Clerk's Office?

A Since March of '85.

Q All right. And in what capacity were you first employed in 1985?

A As a clerk for one of the judges.

Q In the criminal division?

A Yes.

Q Okay. And what capacity do you presently hold?

A Supervisor over the criminal division.

Q Okay. And prior to today I have asked

PAGE 117 (1575) MISSING

A Yesterday.

Q Okay. And were they in the same condition when you received them yesterday as they are in today?

A They are.

Q Okay.

MR. ALEXANDER: I object. I don't know how she could possibly state that they're in the same condition, just looking at the boxes.

THE COURT: I'll overrule --

MR. PAULK: Did we look at them together yesterday, are they in the same condition other than the fact we've got the files out?

THE WITNESS: Yes, sir, they are.

Q (Mr. Paulk continuing) I'm talking about the neatness of them or the messiness of them, depending on how you want to look at it. The same?

A They are.

Q Now, where are the records of these boxes maintained like in a closed file like this? Where are they now maintained? Where are they physically located?

A In our vault.

Q And in what part of the building?

A The basement.

Q Back in 19 - when you were here in 1985, where were those records kept?

A In the vault in the wall.

Q What floor?

A The basement and the first floor.

Q Okay.

A And two and a half floor.

Q Now, as supervisor of the criminal division, let me - you hear Gloria testify about the record on appeal.

A Yes.

Q When you prepare a record on appeal do you maintain the originals with the clerk's files here in Bay County?

A The original record on appeal, we do now. We do.

Q Now, the transcript of the trial, are you familiar with what transcript of the trial is; is that correct?

A I am.

Q Okay. And for purposes of the record, would you explain, do you all after a case is appealed, do you all receive the transcript of the trial back from the Supreme Court or the First District Court of Appeal?

A From the District Court we do, but we don't receive them back from the Supreme Court.

MR. PAULK: That's all the questions I have of this witness, Your Honor.

CROSS EXAMINATION BY MR. ALEXANDER:

Q Say you started in 1985; is that correct?

A Yes, sir.

Q And you said that currently these boxes and the files that have been marked as State's exhibits are maintained in the vault?

A Currently, yes.

Q Okay. In 1985, '86, where were they maintained?

A In the vault, on the two and a half floor, and some in my office.

Q Okay. Now, when you say in the vault, that's the same vault you're talking about?

A Is that the same vault as?

Q In your prior answers as to where they are today, or is that a different vault?

A A different vault, it's in the same area. We have a stand in vault.

Q Okay. So some of them were in the vault in '85, '86, and some of them were in the two and a half floor, the wall?

A The two and a half floor.

Q What is that, a shelf?

A A room.

Q And it has shelves.

A (Indicating in the affirmative)

Q And some were in your office.

A That's correct.

Q And that was in '85, '86. Do you know which of the things that are here today in the '85 - strike that. When were all of the files that have been marked here now, these three boxes plus two file folders moved to the vault?

A About a year ago.

Q About a year ago. Okay. Now, do you know of these portions of the file, until 19 - you looked at these files, I guess, yesterday with Mr. Paulk; correct?

A That's correct.

Q Prior to that time had you ever had occasion to look at these files?

A Um hum.

Q Okay. Did you have occasion to look at these files in say 1985?

A I have off and on since I've been here.

Q Okay. And in say the 1985 time period, were you in court when Gloria testified?

A Yes, I was.

Q Okay. So prior to Gloria reorganizing these file, as she testified, did you have occasion to look at them?

A I did.

Q Were they in the condition that they are presently in terms of organization and neatness?

A No, they were not.

Q Okay. Now, what portions of these files during the period 1985 through '88 were in the vault?

A I don't - I couldn't tell you.

Q What portions of these files during that period 1985 through 1988 were in the wall in the two and a half floor?

A I couldn't tell you.

Q And what portions of these files were in your office during that period of time?

A I could not tell you. It's whatever was - whatever we had the most activity on is what I kept in my office. If a person were to ask for Walter Steinhorst I would furnish them that.

Q So if somebody came in and asked for Walter Steinhorst, what would they be given?

A Walter Steinhorst, boxes, usually anything other than depositions or extra copies of files.

Q Okay. So that would be what was in your office.

A Probably not the depositions, things that they weren't generally interested in looking at.

Q Now, if somebody came in and asked for File Number 77-708 or all of the pieces of paper in that file, what would they be given?

A If they were to ask for that, that's what they would be given.

Q What you just described before as Steinhorst file?

A Yes, sir.

Q Okay. In 1988 - strike that. In 1986, how many clerks were in the office?

A In the criminal division or --

Q Yeah, criminal division.

A Seven, I believe.

Q Okay. Was there a person by the name of Dawn there?

A Yes, there was.

Q And what was Dawn's last name?

A At the time?

Q Oh, she changed her names?

A Shoenauer (phonetic).

Q Dawn what?

A Shoenauer.

Q Is she still with Bay County?

A Yes, she is.

Q And was there a Patty Smith?

A Yes, there was.

Q And is Ms. Smith still here?

A No, she's not.

Q I see. And in 1986 was there any clerk that had specific responsibility for Mr. Steinhorst's files?

A No, there was not.

Q Okay. And indeed did you have specific responsibility for them?

A Not specifically for that file.

Q And your testimony is during that period some of the files were in your office. By your office, what do you mean; the clerk's office there or your personal office?

A The criminal division office.

Q Okay. And somewhere on the wall, on the two and a half floor, and somewhere in the vault.

A That's correct.

Q And also somewhere during that period of time I guess some of these files were given to Gloria because Judge Turner got assigned the case; right?

A Within the criminal division.

Q Now, do you personally know what - strike that. Have you ever met Ms. Cox prior to seeing her in court today?

A I don't recall.

Q Okay. Do you know what files she was given in 1986 when she came over here?

A No, I do not.

Q Do you know if they were the files in your office?

A No, I do not.

Q Do you know if they were the files on the wall in the two and a half floor?

A No, I do not.

Q Do you know if they were the files in the basement?

A No, I do not.

Q Do you know if in fact whatever clerk, whether it was Dawn or Ms. Smith, that got the files went to all of those three locations and got files from all those three locations to give to Ms. Cox?

A Ms. Smith would not have been able to get it from the vault.

Q I see. And you don't know what files were in the vault.

A No, I don't.

Q Would Dawn have been able to get them from the vault?

A No.

Q What files were down in the vault in '86?

A A portion of the Sandy Creek.

Q But what types of files would have been put in the vault?

A First degree murder case, anything which had evidence on it.

Q I think your testimony, and correct me if I'm wrong, things were active, they were kept up because there were requests; right?

A That's correct.

Q In 1986 was Mr. Hughes' case active?

A Not that I recall.

Q Is it possible that Mr. Hughes' case files were in the vault in 1986?

A It's possible.

MR. ALEXANDER: No further questions.

MR. PAULK: I just have a few questions, Judge.

RE-DIRECT EXAMINATION BY MR. PAULK:

Q Let's put some time frames for somebody has requested. Say - you're familiar that Gloria redid these in 1988.

A I am.

Q And broke them down into defendants, regardless of the case number.

A That's correct.

Q Now, have you gone - this is prior to 1988. Excuse me, 1988 she did this. Prior to 1988 if you went and asked for Sandy Creek or if you asked for77-708, what would you have gotten? If you asked for all those files?

A The Sandy Creek files with all of the pleadings.

Q With all of the defendants.

A That's correct.

Q Okay. Now, quite apparent these record are maintained in the clerk's office. The clerk's office consists, I believe, actually where the active files are going on is right downstairs on the first floor.

A That's correct.

Q Where the public can come in. In 1986 - well, let's start with 1987, or let's start with 1986 when Judge Turner was assigned Mr. Steinhorst's 850. Would that have then become an active case?

A It would have.

Q And usually it would then be maintained downstairs where people could get access to it?

A Yes, sir.

Q Okay. And I believe the exhibits we have here today were in the vault until today when it became an active case and you brought them out.

A That's correct.

Q Now, the clerk's office not only has the office downstairs, which is the one where the active cases are, you have, you store files downstairs in the courthouse, in the basement.

A That's correct.

Q You have a place called the two and a half floor.

A (Indicating in the affirmative)

Q Which is, you know, it's right out here between the third and the second floors.

A Yes.

Q Okay. And I believe there are records that are maintained now in the courthouse annex.

A That's correct.

Q Back in 198 - prior to 1988, when these - well, let me ask you this. When you went and gathered these files up, at my request, were they in one location?

A They were.

Q And the practice back in 1986 or '87, would the quote Sandy Creek files, would they be maintained in one location?

A No, they would not.

Q How would they be maintained then?

A Depending on what the case file consisted of. The pleadings were kept together, the depositions, things like that would be kept together and any evidence would be kept in another . . .

Q Okay. That's the, the pleadings. Now, while we're talking about the pleadings what do you refer to when you're referring to pleadings?

A Motions, orders, anything signed by the judges, notice of hearings.

Q That would be kept in one place together.

A That's correct.

Q Then you would have depositions, and they might be kept in a separate place.

A That's correct.

Q Okay. And then the evidence might be kept in another place.

A That's correct.

Q And in fact I did not request you to bring the evidence up here today, did I.

A No, you did not.

MR. PAULK: That's all I have, Judge.

RE-CROSS EXAMINATION BY MR. ALEXANDER:

Q You testified about what the general procedures were in 1986. Do you know specifically what documents from the Sandy Creek cases were in your office in 1986?

A No.

Q Do you know specifically what documents relating to Charlie Hughes' case were in your office, if any, in 1986?

A. No, I do not.

Q Okay. But you do that in fact some of the documents that are here today in 1986 were down in the vault.

A That's correct.

Q And you do know that some of the documents that are here today were also up on the two and a half floor.

A That's correct.

Q And you further know specifically with respect to this case that Dawn and Ms. Smith would not have been able to give access in 1986 to the documents in the vault.

A That's correct.

Q Do you know if in fact the two orders that are Defendant's 1 and 2 here were in the vault in1986?

A They should not have been.

Q Do you know if they were?

A I do not know --

Q Is it possible that they were in the vault?

A Not if I kept the records.

Q Is it possible that they were in the vault?

A Not to my knowledge.

Q Do you know in fact that they were in your office?

A No, I do not.

Q Do you know if they were on the two and a half floor?

A No, I do not.

MR. ALEXANDER: I have no further questions.

MR.PAULK: I don't have any further questions either. Your Honor, at this time I would like to move into evidence - excuse me. Patty Smith, she's deceased now; is that correct?

THE WITNESS: That's correct.

MR. PAULK: Okay. And Dawn, I believe, is still employed downstairs.

THE WITNESS: Yes.

MR. PAULK: All right. I have no further questions of this witness, Your Honor, and move into evidence State's exhibit 1 through 4.

THE COURT: All right. You may step down. And the Court will allow the State to mark in evidence the various documents.

MR. PAULK: Can she go ahead and be excused downstairs?

MR. ALEXANDER: Yes.

THE COURT: That have been identified previously.

MR. PAULK: I don't have any other witnesses, Your Honor. Dawn's available, I don't know if she can add or subtract to anything in this case. She's probably at lunch now.

MR. ALEXANDER: I have no further witnesses.

MR. PAULK: I have none either, Judge.

THE COURT: Do you want to present any argument or do you want to do it by written memo or what's your preference?

MR. ALEXANDER: I'll be happy to, you know, I would be happy to argue it now with the Court or submit a post-hearing memo when we've had a chance to review the transcript.

MR. PAULK: I don't need to review the transcript, Judge.

MR. ALEXANDER: Whatever works is easy for Your Honor.

MR. PAULK: I have no problem with submitting a brief or arguing it now.

THE COURT: I'll leave it to your preference.

MR. ALEXANDER: Why don't we submit a brief afterwards, both sides can do it. I don't know how long it takes to prepare a transcript, as long as I'm going to do it I would just as soon have the record in order to submit the briefs.

MR. PAULK: I've got no problem with that.

MR. ALEXANDER: Shall we say we'll submit - either do it exchange or do it simultaneous with say twenty days, thirty days after we get the record of the transcript?

MR. PAULK: I have no problem with simultaneous, twenty days, if the Court then requests any clarification or additional argument you can say hey look, I need some additional. So why don't we do it simultaneous.

MR. ALEXANDER: And if the Court would, you know, entertain or have some questions it wants, maybe we could have another telephonic hearing to answer whatever questions or additional argument if you want.

THE COURT: All right. So I'll note on the record it will be twenty days after receiving the transcript from the court reporter and if necessary I can contact counsel by telephone conference regarding any clarification and the memos be submitted, like I said, within twenty days.

If somebody gets in ten days or somebody waits until fifteen or twentieth day, but they'll come in simultaneous.

MR. PAULK: Yes, right. Within twenty days they will be filed one way or the other.

THE COURT: One way or the other, okay.

MR. PAULK: Before we conclude, did we put in Ian Haigler's affidavit in? I know it's in the general exhibit, State's exhibit.

MR. ALEXANDER: Which was marked as - forget which number it was.

THE COURT: I'm sorry.

MR. ALEXANDER: I'm sorry, I don't believe that we did. I think I called, but I may have misled you but mispronounced it. Could put it in as part of the record, if you want to put it in.

MR. PAULK: It's part of the record, it's in here, it's in that file, but . . .

THE COURT: You want to call attention to it so I'll know where to look.

MR. PAULK: Yes. Let's mark it into evidence, right, as an additional exhibit. State's Exhibit 5.

THE COURT: Okay.

MR. PAULK: All that's in the file.

MR. ALEXANDER: We assume it's in the file.

THE COURT: All right. And that will conclude the hearing?

MR. ALEXANDER: Thank you very much.

THE COURT: You're welcome.

Court will be in recess.

MR. ALEXANDER: I guess there needs to be an order transporting him back or have you done that?

THE COURT: I don't know if an order needs to be entered. I'll enter an oral order to transfer him back into custody.

*** *** ***

STATE OF FLORIDA

COUNTY OF BAY

CERTIFICATE

I, Jerry S. Edwards, Official Court Reporter of the Fourteenth Judicial Circuit of Florida, do hereby certify that the preceding pages numbered 1 through 136 constitute a true and correct transcript of the proceedings described hereinabove, that I was authorized to and did report the proceedings at the time and place hereinabove set forth.

DONE this 31st day of January, 1995.

_____

OFFICIAL COURT REPORTER

Supreme Court of Florida

No. 82,188

WALTER GALE STEINHORST, Petitioner,

vs.

STATE OF FLORIDA, Respondent.

[April 21, 1994]

PER CURIAM.

We have on appeal an order of the trial court denying relief to Walter Gale Steinhorst, an inmate under sentence of death. The facts of the crime and procedural history of this case are outlined in the prior opinions of Florida courts. Steinhorst v. State, 574 So. 2d 1075 (Fla. 1991); Steinhorst v. State, 498 So. 2d 414 (Fla. 1986); Steinhorst v. Wainwright, 477 So. 2d 537 (Fla. 1985); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982). See also Steinhorst v. State, 438 So. 2d 992 (Fla. 1st DCA 1983). We have jurisdiction pursuant to article V, section 3 (b) (1) of the Florida Constitution.

The relevant facts at hand are as follows. This Court previously ordered the trial court below to conduct a full evidentiary hearing pursuant to Steinhorst's petition for relief pursuant to Florida Rule of Criminal Procedure 3.850.

Steinhorst, 498 So. 2d at 415. After an evidentiary hearing on Steinhorst's 3.850 motion, Circuit Judge W. Fred Turner denied relief in 1988. This Court affirmed the denial of relief in January 1991. Steinhorst, 574 So. 2d at 1078. In October 1991, Steinhorst filed a motion for relief from judgment pursuant to Florida Rule of Civil Procedure 1.540, seeking to have Judge Turner's judgment on the 3.850 motion declared null and void due to the judge's undisclosed conflict of interest. Circuit Judge Don T. Sirmons denied relief on the following bases: rule 1.540 is not the proper method to collaterally attack a criminal judgment and sentence under Florida law; a rule 3.850 motion would be untimely and successive; no merit to the claim that Judge Turner should have recused himself from consideration of Steinhorst's 3.850 motion; and orders entered by judges subject to disqualification are not void and are not subject to collateral attack. Steinhorst appealed Judge Sirmons' denial to this Court.

First, we note that we agree with the trial court that rule 1.540 is not applicable in this case. By its own terms, rule 1.540 applies only to civil causes, not to collateral claims associated with a criminal conviction. However, the court below should have treated this as a 3.850 motion, which would not be barred as untimely or successive if "facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." Fla. R. Crim P. 3.850(b)(1); see also art. V, § 2(a), Fla. Const. ("no cause shall be dismissed because an improper remedy has been sought").

Steinhorst calls this Court's attention to a fact previously not disclosed to us. Prior to becoming a judge, Judge Turner had represented and advised the estate of one of the victims whom Steinhorst was convicted of killing. This representation included giving counsel to the victim's family and the possibility of pursuing a wrongful death or other tort claim on behalf of the victim's estate. Judge Turner recognized the potential for serious conflict and entered an order of recusal

in the trial of one of Steinhorst's codefendants. No such recusal was ordered here, nor did the judge notify the parties of the potential conflict, even though the reasons for recusal applied equally to both cases.

The State calls our attention to the fact that section 38.06, Florida Statutes (1991), appears to render "valid" any order entered by an otherwise-recusable judge when a party has failed to file a timely suggestion of disqualification. Here, the defense did in fact fail to file such a motion in the proceeding in question. However, the defense contends that the failure to determine the trial court's potential conflict occurred in part because the relevant records had been misplaced by the office of the court clerk below. We have no way of knowing if this contention is true, because the trial court below conducted no evidentiary hearing.

If the information regarding the judge's potential conflict was reasonably available and Steinhorst did not move to recuse the judge, then the right to recuse the judge was waived. See § 38.02, Fla. Stat. (1991) (suggestion of disqualification must be filed within thirty days after party or attorney learns of ground for disqualification or ground considered waived).

However, if the relevant records were not reasonably available to Steinhorst and the conflict could not be ascertained by the exercise of due diligence, then the prior recusal would constitute newly-discovered evidence properly cognizable in a 3.850 motion. Moreover, such evidence would present grave due process concerns. A judge who is recused from a codefendant's case also must be recused from another codefendant's case if the reasons for recusal apply equally to both. There is no other conclusion that is consistent with one of the most important dictates of due process: that proceedings involving criminal charges, and especially the death penalty, must both be and appear to be fundamentally fair. As this

Court has noted in Scull v. State, 569 So. 2d 1251, 1252 (Fla. 1990):

> One of the most basic tenets of Florida law is the requirement that all proceedings affecting life, liberty, or property must be conducted according to due process. Art. I, § 9, Fla. Const.... "[D]ue process" embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals. See art. I, § 9, Fla. Const.

Thus, if the trial court determines that the "facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence," Fla. R. Crim. P. 3.850(b)(1), then it should grant the motion for postconviction relief, vacate the 3.850 judgment entered by Judge Turner, and conduct a new evidentiary proceeding pursuant to rule 3.850 and this Court's opinion in Steinhorst, 498 So. 2d at 414-15.

Accordingly, we remand this cause for a factual determination regarding the availability of the relevant records and whether Steinhorst waived the issue of recusal. Based upon our disposition of this matter, we do not address the other matters raised by Steinhorst.

It is so ordered.

SHAW and HARDING, JJ., concur.
BARKETT, C.J., concurs specially.
KOGAN, J., concurs specially with an opinion, in which BARKETT, C.J., concurs.
McDONALD, J., dissents with an opinion, in which OVERTON and GRIMES, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

KOGAN, J., specially concurring.

The appearance of impropriety at issue here was so grave that I believe due process has been seriously violated, creating fundamental error under the due process clause of the Florida Constitution. A judge who has represented the estate and family of a murder victim never should preside over the 3.850 proceeding of the alleged murderer, and especially where that same judge was recused from the case of a co-perpetrator on the exact same issues. Art. I, § 9, Fla. Const. No matter what section 38.06 says, a statute cannot supersede a provision of the Constitution.

I agree with the majority as far as it goes but would go further. I would order that a new and impartial trial judge be appointed to hold a new evidentiary proceeding pursuant to Rule 3.850 and this Court's opinion in Steinhorst, 498 So. 2d at 414-15. I agree with the majority's general statements about due process in this instance but believe the violation is so grave here that the due process claim is nonwaivable under any construction of the facts.

BARKETT, C.J., concurs.

IN THE SUPREME COURT
OF FLORIDA

WALTER GALE STEINHORST,	:	Appeal No. 82,198
	:	(Circ. Case Nos. 77-708
	:	and 72,695)
Appellant,	:	
	:	
vs.	:	
	:	
STATE OF FLORIDA,	:	
	:	
Appellee,	:	

APPELLANT'S INITIAL BRIEF

STEPHEN D. ALEXANDER
ANTHONY G. GRAHAM
FRIED, FRANK, HARRIS
SHRIVER & JACOBSON
725 South Figueroa St.
Suite 3890
Los Angeles, CA 90017
(213) 689-5800

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT .....

STATEMENT OF THE CASE AND OF THE FACTS.....

SUMMARY OF ARGUMENT .....

ARGUMENT.....

THE COURT ERRED IN HOLDING THAT RULE 1.540 IS NOT THE APPROPRIATE PROCEDURE FOR REOPENING THE JUDGMENT.....

THE COURT ERRED IN NOT FINDING THE 3.850 JUDGMENT VOID AS A RESULT OF JUDGE TURNER'S BLATANT UNDISCLOSED CONFLICT OF INTEREST.....

I. JUDGE TURNER HAD A CLEAR CONFLICT OF INTEREST .....

II. DUE TO JUDGE TURNER'S CLEAR CONFLICT, THE 3.850 JUDGMENT IS NULL AND VOID .....

III. THE JUDGMENT IS VOID BECAUSE IT FAILED TO COMPLY WITH FUNDAMENTAL PRINCIPLES OF DUE PROCESS .....

THE COURT ERRED IN FINDING THE 1.540 MOTION TIME BARRED .....

THE COURT ERRED IN FINDING THAT PREJUDICE NEED BE SHOWN .....

THE COURT ERRED IN IGNORING THE UNDISPUTED EVIDENCE THAT JUSTICE ADKINS, HAD HE HEARD THE 3.850, WOULD HAVE IMPOSED LIFE SENTENCES.....

VIII. CONCLUSION.....

PRELIMINARY STATEMENT

Appellant Walter Gale Steinhorst (hereinafter "Steinhorst" or "Appellant") respectfully appeals to this Court from the Order of Fourteenth Judicial Circuit Court Judge, the Honorable Don T. Sirmons, entered on April 9, 1993, and the Order on Rehearing entered on July 8, 1993 (collectively, the "Orders"). The Orders denied Appellant's Motion for Relief From Judgment pursuant to Fla. R. Civ. P. 1.540(b)(4), which sought to set aside the judgment (the "Judgment") entered by Judge W. Fred Turner in June 1988 which denied Mr. Steinhorst's Motion to Vacate Conviction and Sentence filed pursuant to Fla. R. Crim. P. 3.850.

STATEMENT OF THE CASE AND OF THE FACTS

For purposes of this appeal, the history of this case is summarized as follows:

- On November 30, 1977, Walter Steinhorst, David Goodwin and Charlie Hughes were indicted by the Panama City Grand Jury for the first degree murders of Douglas Hood, Sheila McAdams and Sandra McAdams. Walter Steinhorst was also indicted for the premeditated first degree murder of Harold Sims. The three defendants' cases were severed.

On April 24, 1978 Mr. Steinhorst's trial commenced in the Circuit Court in and for Bay County, Panama City (the "Circuit Court") before then Florida Supreme Court Justice James C. Adkins, who was sitting by special designation. The jury convicted Mr. Steinhorst of first degree murder on all four counts. It was not stated whether the verdicts were based on a finding of felony or premeditated murder. Following a jury

recommendation, Mr. Steinhorst was sentenced to death on three of the four counts, and received a sentence of life imprisonment for the murder of Harold Sims.[1]

- Rehearing was denied on April 27, 1982.

- On January 18, 1984, appellant filed a habeas corpus petition in this court, setting forth five claims for relief. On September 26, 1985, this Court denied the petition. Steinhorst v. Wainwright, 477 So. 2d 537 (Fla. 1985). Rehearing was denied on November 19, 1985.

- On February 13, 1986, appellant filed a Motion for Post-Conviction Relief, pursuant to Florida Rule of Criminal Procedure 3.850, in the Circuit Court. The motion was heard by Circuit Court Judge W. Fred Turner. Judge Turner denied the motion in a one page order, and without his ever having seen, let alone read, the trial record or any briefs, and without holding any evidentiary hearing, on March 24, 1986.

- Mr. Steinhorst and his attorneys received no notice of the denial of his 3.850 motion. His attorneys first learned of the decisions by reading a press release that the Governor of Florida had issued a warrant for Mr. Steinhorst's execution, on November 6, 1986.

---

[1] Justice Adkins also presided, several weeks later, over the separate trial of co-defendant David Goodwin. The other co-defendant, Charlie Hughes, was a fugitive from justice until 1981.

- On November 14, 1986, Mr. Steinhorst requested a stay of execution and moved the Circuit Court to vacate its order of March 24, 1986.

- On November 20, 1986, Judge Turner granted Mr. Steinhorst's request to vacate the March 24, 1986 order, but again summarily denied the Rule 3.850 motion and denied the request for a stay of execution.

- On November 21, 1986, Mr. Steinhorst appealed the denial of the Rule 3.850 motion to this Court and requested a stay of execution.

- On November 26, 1986, this Court granted petitioner's request for a stay of execution, vacated the Circuit Court's order, and remanded the case for further proceedings. Steinhorst v. Florida, 498 So. 2d 414 (Fla. 1986).[2]

- An evidentiary hearing on Mr. Steinhorst's Rule 3.850 motion was conducted in the Circuit Court on September 16-18, 1987.

---

2 In so holding, the Florida Supreme Court observed that Judge Turner had not even bothered to "examine the trial record and did not have the record before him when ruling on appellant's ... motion," in violation of Rule 3.850. Steinhorst v. State, 498 So. 2d 414, 415 (Fla. 1986). Consequently, Judge Turner also violated Rule 3.850 by failing to attach portions of the record conclusively showing that Mr. Steinhorst was entitled to no relief.

- Judge Turner entered an order denying the Rule 3.850 motion on June 23, 1988.[3]

- On July 5, 1988, Mr. Steinhorst filed a notice of appeal of the Circuit Court's denial of his Rule 3.850 motion.

- On January 15, 1991, this Court affirmed the Circuit Court's denial of relief. Steinhorst v. State, 574 So. 2d 1075 (Fla. 1991). Justices Kogan and Barkett dissented an the grounds that there was Hitchcock error at the penalty phases:

> The record before us discloses substantial mitigating evidence improperly excluded from Steinhorst's trial as a direct result of this Court's erroneous ruling in Cooper.... For these reasons, I believe there is no question that the federal courts under their own precedent must grant

---

3 In the course of reviewing materials for the record on appeal with the Assistant State Attorney, defendant's counsel learned that yet again Judge Turner had failed to read the trial record. The deputy clerk of the trial court informed defendant's counsel that the clerk's office did not have the transcript of Mr. Steinhorst's original trial because the trial court had never received that transcript back from the Supreme Court and it had no copy. Judge Turner confirmed this omission in his sua sponte order dated August 3, 1988 by acknowledging that "the original trial transcript ... is lodged in the Supreme Court of Florida." See, 3.850 ROA, 799. Appellant will cite to the Record on Appeal in the Rule 3.850 proceedings as "3.850 ROA" and to the record on appeal in the instant appeal as "MRJ ROA."

relief if this Court fails to do so. No good reason exists to delay such relief any longer.

• On March 6, 1991, this Court denied appellant's motion for rehearing.

• On October 4, 1991, Mr. Steinhorst filed in the Circuit Court a Motion for Relief from Judgment pursuant to Florida Rule of Civil Procedure 1.540(b)(4), seeking to have judge Turner's judgment on the Rule 3.850 motion declared null and void due to the judge's undisclosed conflict of interest.

• This matter was originally assigned to Judge N. Russell Bower. Judge Bower indicated that he would recuse himself from this cause in order to avoid any appearance of impropriety, as he had previously worked at the State Attorney's office. On December 4, 1992, Judge Bower entered an Order Recusing himself, and the matter was reassigned to Chief Judge Don T. Sirmons on December 7, 1992.

On February 12, 1993, after a telephone status conference call with counsel, the court entered an Order of Procedure directing as follows:

(1) That the State of Florida has thirty (30) days from the date hereof to respond to defendant's Motion for Relief From Judgment and Defendant shall likewise have thirty (30) days from service of the State's response to respond.

(2) Thereafter, the court will consider the written response; schedule a supplemental status conference; and set out any additional procedures it deems necessary to depose of the pending motion.

MRJ ROA, 44, Order, dated February 12, 1993 (emphasis added).

On March 15, 1993, the State filed its response, which was termed a "Motion to Dismiss and Response to Motion for Relief From Judgment," Mr. Steinhorst's Reply was therefore due on April 14, 1993.

- On April 12, 1993, however, without holding any hearing and without giving Mr. Steinhorst an opportunity to respond to the State's motion to dismiss, Circuit Judge Don T. Sirmons denied the Rule 1.540 motion.

- On April 24, 1993, Mr. Steinhorst timely filed a motion for rehearing.

- On July 8, 1993, the Circuit Court granted the motion for rehearing but again denied the Rule 1.540 motion.

- On August 2, 1993, Mr. Steinhorst timely filed his notice of appeal.

SUMMARY OF ARGUMENT

The court erred in holding that Rule 1.540 is not the appropriate procedure for reopening the judgment. A 3.850 motion is, by its very terms, a motion to set aside the conviction and sentence and thus, contrary to the court's order, not the appropriate vehicle for challenging a 3.850 judgment. The Rule and case law make clear that Rule 1.540 is the correct vehicle. Further, the court erred in not finding the 3.850 judgment void since Judge Turner had a clear conflict of interest and a judgment entered by a judge with a disqualifying interest is void and has no effect at all. The judgment is also void since it failed to comply with fundamental principles of due process, since Judge Turner's conflict violated Mr. Steinhorst's right to an impartial tribunal. The court also erred in finding the 1.540 motion time barred since the motion was

filed within a "reasonable time" of the discovery of Judge Turner's conflict. Finally, the court erred in finding that Mr. Steinhorst needed to show prejudice as a result of that conflict, since the mere fact of the conflict disqualifies a judge, and also in ignoring the undisputed evidence that Justice Adkins, had he heard the 3.850, would have imposed life sentences. Appellant requests relief from these errors. Because of the complexity and importance of the matters at issue in this appeal, appellant also respectfully requests a hearing on oral argument as to this appeal. See, attached Request.

ARGUMENT

THE COURT ERRED IN HOLDING THAT RULE 1.540 IS NOT THE APPROPRIATE PROCEDURE FOR REOPENING THE JUDGMENT

Florida Rule of Civil Procedure 1.540(b) provides, in pertinent part,

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, decree, order or proceeding for the following reasons: ... (4) the judgment or decree is void... The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, decree, order or proceeding was entered or taken. ... Writs of coram nobis, coram vobis, audita querela and bills of review and bills in the nature of a bill of review are abolished and the procedure for obtaining any relief from a judgment or decree shall be by motion as prescribed in these rules or by an independent action.

Appellant's motion sought relief under Rule 1.540(b)(4), and was not a successor motion under Florida

Rule of Criminal Procedure 3.850. A 3.850 motion, by its very terms, is a motion to set aside the conviction and sentence. Here, Mr. Steinhorst was not attempting to set aside his conviction and sentence but rather, to set aside the 3.850 judgment entered by Judge Turner. Thus, contrary to the Court's Order a 3.850 motion would not be the appropriate vehicle for challenging that 3.850 judgment.

Both the Court and the State Attorney misinterpreted the Rule 1.540 motion. Mr. Steinhorst fully agrees that Rule 1.540 is not the appropriate vehicle for moving to vacate a conviction and sentence. But, as stated at the outset in his Rule 1.540 motion, Mr. Steinhorst was not seeking to vacate the conviction and sentence in this proceedings. Nor was the Rule 1.540 Motion an attempt to relitigate the issues raised by the Rule 3.850 motion. Rather, the motion is intended to vacate a void judgment.

As the rule states and case law makes clear, Rule 1.540 is the correct vehicle to set aside a judgment. See, e.g., Department of Transportation vs. Bailey, 603 So. 2d 1384 (Fla. 1st DCA 1992) (holding that Rule 1.540 is the correct mechanism to attack a void judgment and analogizing to Federal Rule of Civil Procedure ("FRCP") 60(b)). As discussed therein, Rule 1.540(b) was modeled after FRCP 60(b), and Rule 60(b) is the appropriate vehicle to move to vacate a federal habeas determination. Id.; see also Gray vs. Estelle, 574 F.2d 209 (5th Cir. 1978) (citing Pitchess vs. Davis, 421 U.S. 482 (1975)).[4]

---

[4] Although Rule 3.850 is a rule of criminal procedure, proceedings under the rule are not steps in the criminal prosecution but are in the nature of independent, collateral civil actions; State v. White, 470 So. 2d 1377 (Fla. 1985) (the "post-conviction collateral remedies [such as those provided

Footnote continued

Bailey also makes clear that when it is asserted that the underlying judgment is void, the reviewing court must evaluate the underlying judgment in reviewing the order denying the motion. The Bailey court held as follows:

> Ordinarily, review of a trial court's denial of a 1.540(b) (or Federal Rule 60(b) motion) is limited to determining whether the denial amounts to an abuse of discretion. Where, however, it is asserted that the underlying judgment (or part thereof, as in the instant case) is void, it is necessary to evaluate the underlying judgment in reviewing the order denying the motion. VTA Inc. v. Airco, Inc., 597 F.2d 220 (10th Cir. 1979).

Footnote continued from previous page

by rule 3.850 and writs of error coram nobis and habeas corpus] are not steps in a criminal prosecution but are in the nature of independent collateral civil actions"); State v. Lasley, 507 So. 2d 711 (Fla. 2d DCA 1987) ("Like a habeas corpus proceeding an action under rule 3.850 is considered civil in nature and collateral to the criminal prosecution which resulted in the judgment of conviction, notwithstanding the inclusion of rule 3.850 within the criminal rules"); Tolar v. State, 196 So. 2d 1, 3 (Fla. 4th DCA 1967). Thus, the proceedings are governed by the rules of civil procedure, except where those rules are inconsistent with the specific provisions of Rule 3.850. Green v. State, 280 So. 2d 701, 702 (Fla. 5th DCA 1973).

Id. at 1386. The Bailey court also held that if it is determined that the judgment entered is void, "the trial court has no discretion, but is obligated to vacate the judgment." Id. at 1387. In Airco, cited with approval in Bailey, the court held that the reviewing court must determine whether the court rendering the judgment was without jurisdiction and whether that court acted in a manner inconsistent with the due process of law. See Airco, 597 F.2d 220, 225.

Where there is no existing rule of criminal procedure that fits the particular situation sought to be remedied, as in this case, a litigant must resort to the existing rules of civil procedure. See Luhra v. State, 394 So. 2d 137, 139 n.1 (Fla. 5th DCA 1981) (citing Boggs v. Wainwright, 223 So. 2d 316, 317 (Fla. 1969) for the proposition that a court may adopt a civil rule -- Rule 1.540(a) concerning correction of clerical errors -- for use in a criminal case when no comparable criminal rule exists). See also Tolar v. State, 196 So. 2d at 4 ("Rule 1 [now Rule 3.850], like [28 USC] § 2255, is not all comprehensive or exclusive of relief otherwise available by motion under the classical writs or under Rule 1.38 (now rule 1.540) of the Rules of Civil Procedure.").

Rule 3.850 was patterned after the federal post-conviction statute, 28 U.S.C. § 2255, and cases decided under the federal statute serve as a guide to the proper application and interpretation of the Florida rule where there is no Florida precedent. Roy v. Wainright, 151 So. 2d 825, 828 (Fla. 1963); Tolar v. State, 196 So. 2d at 3. When a petitioner seeks to set aside a federal habeas determination, the avenue for doing so is Federal Rule of Civil Procedure 60, which is the federal counterpart to Fla. R. Civ. P. 1.540. See, e.g., Gray v. Estelle, 574 F.2d 209 (5th Cir. 1978) (citing Pitchess v. Davis, 421 U.S. 482 (1975)). In fact, it is clear from the face of Rule 1.540 that it was modeled after Fed. Rule Civ. P. 60. See DeClaire v. Yohanan, 453 So. 2d 375, 377 (Fla. 1984).

Hence, it is incontrovertible that Rule 1.540 is the appropriate vehicle for attacking a 3.850 judgment that was entered by a judge who was subject to an unrevealed conflict of interest. See, Aetna Life & Casualty Co. v. Thorn, 319 So. 2d 82 (Fla. 3rd DCA 1975). In Aetna, the appellant moved to set aside the final judgment after learning that the judge had an undisclosed conflict. Aetna did not learn of the conflict until after entry of final judgment. The court there noted that "[a] judge occupies such a particular position in the affairs of other men that not only must he be free of evil intent but he must also avoid the appearance of evil." Id., at 84. The court also noted that § 38.02, Fla. Stat. is not the exclusive remedy for the disqualification of a judge, because that statute by its terms applies only to those cases in which a final judgment has not been entered. Id. The court then reversed the order denying appellant's 1.540 motion and remanded the case to the trial court with directions to proceed to a hearing upon that motion. Id., at 85.

It is therefore apparent that the Court erred in finding that Rule 1.540 is not the appropriate vehicle for moving to set aside Judge Turner's Order.

I. JUDGE TURNER HAD A CLEAR CONFLICT OF INTEREST

The Court erred both in failing to accept that Judge Turner's denial of the Rule 3.850 motion was void because he had a disqualifying interest due to his involvement with the victim's estate (which was a violation of Canon 3C of the Florida Code of Judicial Conduct), and in holding that § 38.01 Florida Statutes, was in any way implicated in this matter. The Court concluded, without any consideration of Mr. Steinhorst's arguments, as follows:

> The Court also finds that should Rule 1.540 be a valid ground to seek collateral attack, the judgment is not void because the Defendant's

> claim is barred by time, and is based upon the imagined bias of Judge W. Fred Turner without any showing under F.S. 38.01 (sic), that Judge Turner appeared as a party of record in this case.

See, MRJ ROA 67-68, 109. Although the Court acknowledged that Judge Turner recused himself in Hughes' cases in June 1981, the Court ignored the significance of that fact. Quite simply, the Court ignored the facts and binding legal authority to reach a decision unclouded by legal argument, evidentiary support or common sense.

In the relatively recent course of investigation of this case, attorneys for Mr. Steinhorst discovered that Judge Turner had a serious conflict of interest which compelled him to recuse himself from considering the 3.850 motion. Judge Turner had represented the estate of Harold Sims, one of the victims in this case, had had previous contact with the Sims' family and on the basis of that representation had sua sponte advised counsel for co-defendant Charlie Hughes that he would recuse himself, upon request, from presiding over Mr. Hughes' trial. See, MRJ ROA 28, Order dated July 9, 1981. Hughes, who was a fugitive from justice until 1981, was indicted on the same charges as Walter Steinhorst and tried soon after his capture. As a result of Judge Turner's disclosure, the Hughes trial was promptly reassigned to another judge. See, MRJ ROA 29, Order of Consolidation and Reassignment, dated July 15, 1981.

Despite the fact that he had previously advised Hughes' counsel of and signed an order recognizing his "conflict of interest," Judge Turner failed to inform Mr. Steinhorst's counsel of this blatant conflict when counsel appeared before

him in 1986 to prosecute defendant's 3.850 motion.[5] The State Attorney's office, which was also aware of this conflict as a result of having prosecuted Mr. Hughes, similarly failed to inform Mr. Steinhorst's counsel of this matter.[6]

Section 38.01, Florida Statutes, automatically disqualifies the judge who is a party in an action from sitting in judgment in that same action. However, contrary to the Court's findings, this is not the only body of law in this state that governs judicial disqualifications and recusals. Since judicial disqualifications are procedural matters,[7] the rules

---

5 Nor did Judge Turner advise counsel of this conflict at any time during the more than two year time frame in which he dealt with Mr. Steinhorst's 3.850 motion.

6 State Attorney James Appleman's office both prosecuted Charlie Hughes in 1981 and opposed Mr. Steinhorst's 3.850 motion in 1986-87. Current counsel for Mr. Steinhorst, who are out-of-state pro bono counsel, did not become involved in the Steinhorst case until 1983.

7 The manner of judicial disqualification is without a doubt procedural. As stated in Johnson v. State, 308 So. 2d 127 (Fla. lst DCA 1975):

> Practice and procedure encompass the course, form, manner, means, method, mode, order process or steps by which a party enforces substantive rights or obtains redress for their invasion. Substantive law creates those rights. Practice and

Footnote continued

promulgated by the Florida Supreme Court take precedence over statutes enacted by the Florida legislature. That principle is found in the Florida Constitution, Article 11, § 3 and Article V, § 2(a), as well as case law. See, e.g., Gator Freight Ways, Inc. v. Mayo, 328 So. 2d 444 (Fla. 1976); Duval County School Board v. Florida Public Employees Relations Commission, 346 So. 2d 1087 (Fla. 1st DCA 1977). Among the rules promulgated by the Florida Supreme Court are the judicial disqualification provisions of Florida Rule of Criminal Procedure 3.230 (which was the applicable rule at the time Mr. Steinhorst filed his 1.540 motion but which has since been superseded by Florida Rule of Judicial Administration 2.160) and the Florida Code of Judicial Conduct, Canon 3(C).

Rule 3.230 mandates that a judge recuse himself whenever a lawyer files a legally sufficient affidavit asserting reasons for judicial disqualification. Had Mr. Steinhorst's counsel been aware of Judge Turner's representation of Harold Sims' estate, they would have moved for disqualification pursuant to that rule. Unfortunately, Judge Turner failed to disclose this information to counsel, as did prosecuting counsel

---

Footnote continued from previous page

> procedure may be described as the machinery of the judicial process as opposed to the product thereof.

Id., at 129.

Thus, the rules promulgated and adopted by the Supreme Court are controlling.

and the courthouse files were incomplete and thus prevented counsel from discovering the conflict; thus no such motion was filed.

Moreover, the Code of Judicial Conduct clearly anticipates situations such as this one. The Code demands that judges should disqualify themselves on their own initiative when their impartiality might reasonably be questioned. In the instant case, it is incontrovertible that a reasonable person would question the impartiality of a judge that represented the estate of the victim.[8]

If Judge Turner believed himself to be impartial, then at the very least he should have abided by Canon 3(D) and

---

8 Judge Turner's failure to disqualify himself from hearing Mr. Steinhorst's 3.850 Motion is a clear violation of Canon 3, subd. C(1) of the Code of Judicial Conduct. The preface to the Code of Judicial Conduct states that the provisions of the code and the standards that judges should observe "are mandatory unless otherwise indicated." See also, Department of Revenue v. Golder, 322 So. 2d 1, 3 n.8 (Fla. 1975). The Code provides in relevant part:

C. Disqualification

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings;

disclosed his participation in the representation of Sims' estate and allowed the attorneys to make an informed decision regarding his disqualification.[9]

Here, Judge Turner represented Harold Sims' estate. Mr. Steinhorst was convicted of killing Harold Sims. Moreover, in representing Sims' estate, Judge Turner listed the value of the estate as including the proceeds of a "wrongful

---

9 Canon 3(D) provides:

> A judge disqualified by the terms of Canon 3C(l)(c) or Canon 3C(l)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding. It is important to note, however, that when the reason for disqualification is the possibility of bias, prejudice, or personal knowledge of facts, mere disclosure is not sufficient; in those cases the judges must disqualify. [Emphasis added.]

death" claim. See, MRJ ROA 97, In Re Estate of Harold George Sims, Case No. 78-182-CP. The implication is clear: Judge Turner was aware of the facts surrounding Sims' life and death, and he made an evaluation that there was a possibility of prevailing in a wrongful death action.[10] Based on those facts a reasonable person would doubt the impartiality of Judge Turner.[11] Thus, Judge Turner was disqualified from

---

10 Judge Turner therefore at least implicitly concluded that Sims had no role in bringing about his own death, which is directly contrary to the allegations contained in the Rule 3.850 motion. As noted in the Rule 1.540 motion, much of the evidence presented at the 3.850 hearing pertained to the background and character of Mr. Sims and that he was not an innocent victim but rather was armed and went to Sandy Creek to "rip off" the drug deal.

11 The case law in this jurisdiction clearly establishes that "[(t)he burden is upon the individual judge to determine his qualification to sit on a particular case." Aetna Life & Casualty Company v. Thorn, 319 So. 2d 82, 84 (Fla. 3d D.C.A. 1975). At the core of the due process guarantee of a fair trial is the principle that every litigant is entitled to nothing less than the "cold neutrality of an impartial judge." State ex rel. Davis v. Parks, 141 Fla. 516, 194 So. 613 (Fla. 1939); Pistorino v. Ferguson, 386 So. 2d at 67; McGregor v. Hammock, 101 Fla. 1170, 132 So. 815 (Fla. 1931); State v. Cannon, 166 So. 2d 625, 627 (Fla. 3d D.C.A. 1964); see also, State ex rel. Mickle v. Rowe], 100 Fla. 1382, 1385, 131 So. 331, 332 (Fla. 1930) ("It is the duty of the courts to scrupulously guard [the right of the litigant [to an impartial judge] and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought in question. The exercise of any other policy tends to

Footnote continued

considering all Steinhorst proceedings, and his 1988 Order Denying Rule 3.850 Relief was void ab initio.

It is perfectly clear that in this case Judge Turner failed to fulfill his judicial duties. The question of disqualification of a judge focuses on those matters from which a litigant may reasonably question a judge's impartiality rather than the

---

Footnote continued from previous page

discredit and place the judiciary in a compromising attitude which is bad for the administration of justice.")

> "No judge under any circumstances is warranted in sitting in the trial of a cause whose neutrality is shadowed or even questioned. . . .
> "It is a matter of no concern what judge presides in a particular cause, but it is a matter of grave concern that justice be administered with dispatch, without fear or favor or the suspicion of such attributes. . . . The judiciary cannot be too circumspect, neither should it be reluctant to retire from a cause under circumstances that would shake the confidence of litigants in a fair and impartial adjudication of the issues raised.

Dickinson v. Parks, 104 Fla. 577, 582-84, 140 So. 459, 462 (1932).

judge's perception of his ability to act fairly and impartially. Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983). Under this standard a motion for disqualification clearly would have been granted since Judge Turner's prior representation of the Sims' estate presents a situation where the Judge's impartiality could reasonably be questioned. Not only was Mr. Sims a victim in this case, but also much of the evidence presented at the 3.850 hearing pertained to the background and character of Mr. Sims and the fact that he and one of the other victims, Doug Hood, were not innocent victims as portrayed at the trial but rather were armed and went to Sandy Creek to "rip off" the marijuana that was being unloaded.

More importantly, Judge Turner's determination that his representation of the estate of Harold Sims disqualified him from presiding over Hughes' trial leaves no question that he was not qualified to hear defendant's 3.850 motion since both men were charged with having committed the same crimes. See Pistorino v. Ferguson, 386 So. 2d 65, 67 (Fla. 3d D.C.A. 3.980) (judge's spontaneous commitment to recuse himself at the option of counsel is convincing evidence of his own awareness of bias).

The conflict at issue in this capital case renders the failure by Judge Turner to disclose this conflict inexcusable, and irreparably undermines the reliability of his findings regarding Mr. Steinhorst's challenge to his convictions and death sentences.[12] If defendant's counsel had known of Judge

---

12 Not surprisingly, this was not the first time that Judge Turner had deviated from properly fulfilling judicial duties. In October 1982, the Supreme Court of Florida, on recommendation from the Florida Judicial Qualification Commission, held that certain conduct by Judge Turner, which "[brought] the Judiciary into disrepute. . .", warranted

Footnote continued

Turner's conflict of interest at the time that defendant's 3.850 Motion was heard, they most certainly would have moved for his recusal.

The court's refusal to acknowledge this blatant conflict of interest constitutes reversible error.

II. DUE TO JUDGE TURNER'S CLEAR CONFLICT, THE 3.850 JUDGMENT IS NULL AND VOID

The 3.850 judgment entered against Mr. Steinhorst is null and void under Rule 1.540(b)(4). It is well established that a judgment entered by a judge with a disqualifying interest is void and should have no effect at all. See e.g., American Construction Co. v. Jacksonville, Tampa and Key West Railway Co., 148 U.S. 372, 287-88 (1893) (where circuit judge was disqualified by law to take part in the case, decree entered by such judge is void and must be set aside); State ex rel. Farmers' Trust Co. v. Chillingworth, 107 Fla. 747, 143

Footnote continued from previous page

public reprimand. See In re Turner, 421 So. 2d 1077 (Fla. 1982). That conduct included a "direct violation of the Code of Judicial Conduct" by initiating ex parte communications with one of the parties to a custody matter; the deprivation of two individuals of "elementary due process" through the "arrogant, arbitrary and capricious abuse of his powers as a Circuit Judge" and the impeach[ment] [of] the public's confidence in the integrity and impartiality of the Judiciary" by failing "to observe elementary standards of judicial conduct" by arrogantly and improperly admonishing attorneys appearing before him. Id. at 1079-80.

So. 294 (1932) (a circuit judge who has a disqualifying interest in the litigation is ipso facto cut off and disqualified to make any order or decree in the cause, and any such order or decree entered by such judge, even when done in good faith and without knowledge of the disqualifying circumstances, is void); Hogan v. State, 89 Fla. 388, 104 So. 598 (1925) (recognizing right of every litigant to a trial by a tribunal uninfluenced by a taint of interest or partiality and holding that the orders entered by the disqualified judge were void).

The decision in Boyer v. State, 486 So. 2d 70 (Fla. 4th DCA) cert. denied, 494 So. 2d 1149 (Fla. 1986), is instructive. Boyer involved an appeal of the denial of the defendant's 3.850 motion, in which he raised for the first time the issue that one of the judges who presided on his direct appeal should have recused himself based on the judge's prior involvement 16 years earlier. The District Court of Appeal, treating this prong of the 3.850 appeal as a petition for a writ of habeas corpus, held that "the judge's presence on the panel that reviewed appellant's conviction could not so flagrantly have affected appellant's due process rights as to void the appellate proceedings." Id. at 72. In so holding, the court concluded that the chances were remote that the judge's opinion was influenced by his prior involvement, and there were two other judges on the appellate panel that unanimously affirmed Boyer's conviction. See also, Giuliano v. Wainwright, 416 So. 2d 1180 (Fla. 4th DCA 1982) (connection between the judge's presiding over petitioner's prior conviction and his position as a member of the appellate panel regarding a different conviction was too attenuated to mandate voiding the appellate decision in the latter case); cf., Muina v. Hood, 516 So. 2d 1117 (Fla. lst DCA 1987) (denying appeal of 1.540 motion wherein appellant claimed that final judgment entered six years before by biased judge was a nullity; court held that appellant's asserted grounds for disqualification -- that in a separate case the judge refused to grant a stay of execution and failed to send him a copy of the judgment -- had no factual basis and were insufficient to show a well-founded fear of prejudice).

These cases clearly contemplate that where there is a sufficient showing of judicial bias, such bias does render the judgment void. It is clear that Judge Turner's consideration of Mr. Steinhorst's 3.850 motion did "so flagrantly affect [Mr. Steinhorst's] due process rights as to void the [3.850] proceedings." Boyer, 486 So. 2d at 72.

III. THE JUDGMENT IS VOID BECAUSE IT FAILED TO COMPLY WITH FUNDAMENTAL PRINCIPLES OF DUE PROCESS

It is well established that any judgment entered in a manner that fails to comply with fundamental due process principles is void. Pennover v. Neff, 95 U.S. 714 (1878). Rule 3.850 proceedings are governed by due process principles, Holland v. State, 503 So. 2d 1250, 1252 (Fla. 1987), and when Judge Turner presided at Mr. Steinhorst's 3.850 proceeding, he violated Mr. Steinhorst's fundamental due process right to an impartial tribunal. As stated in In re Murchison, 349 U.S. 133 (1955):

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law."

Id. at 136 (citations omitted); See, Mayberry v. Pennsylvania, 400 U.S. 455, 464-65 (1971) (disregard for the appearance of impartiality is a due process violation which voids a judgment of contempt); Johnson v. Mississippi, 403 U.S. 212, 215 (1971) (due process requires that criminal defendant's case be heard by an impartial judge); Tumey v. Ohio, 273 U.S. 510, 522 (1927) (to subject a defendant to trial in a criminal case involving his liberty or property before judge having a direct, personal, substantial interest in convicting him is a denial of due process of law); Sandstrom v. Butterworth, 738 F.2d 1200 (11th Cir. 1984), cert. denied, 469 U.S. 1109 (1985) (acknowledging fundamental due process right to impartial tribunal and affirming district court's order granting habeas corpus petition due to trial judge's failure to recuse himself from determining whether petitioner was in contempt of court); Scott v. Anderson, 405 So. 2d 228, 236 (Fla. 1st DCA 1981), cert. denied, 415 So. 2d. 1359 (Fla. 1982) (disregard for the appearance of impartiality is a due process violation which voids a judgment of contempt).

The conflict in the instant case was so obvious that Judge Turner, in co-defendant Charlie Hughes' case, sua sponte apprised his counsel of the conflict. As a matter of simple fairness, Mr. Steinhorst should have been given the same opportunity that Charlie Hughes was given. The duty was on the judge, and Mr. Steinhorst should not be penalized because Judge Turner revealed the conflict to Hughes but declined to do so for Mr. Steinhorst.[13]

---

13 Here, Judge Bower, who was originally assigned the motion, recused himself, because of the fact that he was in the State Attorneys office at the time of the Sandy Creek trials, although not personally involved in and had no personal knowledge of the case. If merely being "in the office" at the time another attorney was trying a case is sufficient to warrant

Footnote continued

In addition to Judge Turners' undisclosed conflict of interest, the fact that he had already recused himself from the case renders his judgment void. Florida case law indicates that where a judge recuses himself in a case, subsequent orders in that case are a nullity. Bolt v. State, 594 So. 2d 864 (Fla. DCA 5th 1992) (civil); Swartz v. Swartz, 431 So. 2d 716, 717 (Fla. DCA 3rd 1983) (civil); State ex. rel. Cobb v. Bailey, 349 So. 2d 849, 850 (Fla. DCA 1st 1987); cert. denied, 348 So. 2d 953 (Fla. 1977) (criminal); Vaughn v. State, 226 So. 2d 459, 462 (Fla. DCA 2nd 1968) (criminal); Hooks v. State, 207 So. 2d 459, 462 (Fla. DCA 2nd 1968) (criminal). On July 15, 1981, when Judge W. Fred Turner recused himself by written order in Case No. 77-708, see, MRJ ROA 28. Mr. Steinhorst remained a co-defendant in that case. As such, Judge Turner recused himself from taking any further action with respect to Case No. 77 - 708 and therefore rendered his future orders in Mr. Steinhorst's 3.850 motion -- filed in that same case nugatory.

Rule 3.850 is an equitable remedy, patterned after its federal counterpart, 28 U.S.C. § 2255. Roy v. Wainwright, 151 So. 2d 825, 828 (Fla. 1963). In a related context, the United States Supreme Court has repeatedly reaffirmed that "habeas corpus has traditionally been regarded as governed by equitable principles." Kuhlmann v. Wilson, 477 U.S. 436, 447 (1986) (quoting Fay v. Noia, 372 U.S. 391, 438 (1963)). This is a unique situation, and equity demands that Mr.

Footnote continued from previous page

recusal, the actual representation of the estate of the victim is clearly sufficient grounds.

Steinhorst be given a fair and impartial 3.850 proceeding.[14] This is all the more true in a case in which a man's life is at stake.

The United States Supreme Court has dealt with precisely this issue in a case on point, Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988). In that case which involved a Judge with a conflict of interest in the case before him, a dispute arose between plaintiff and Health Services regarding the site of a proposed hospital. Plaintiff wanted to build the hospital on a site that was owned by Loyola University, and negotiated a purchase price for the land, a price approved by the board of trustees for the university.

The case was heard by federal district court Judge Collins, who also happened to be a trustee for Loyola University. Judge Collins failed to disqualify himself as required by 28 U.S.C. Section 455(a).[15] Nor did Judge Collins

---

14 Factual findings by a conflicted judge would not, of course, be entitled to any deference from a federal habeas court. See 28 U.S.C. § 2254(d)(2) (fact finding process not adequate to afford a full and fair hearing), (6) (applicant did not receive a full, fair and adequate hearing in the state court), and (7) (applicant was otherwise denied due process of law in the state court proceeding).

15 Title 28 U.S.C. Section 455(a) is based on, and virtually identical to, Canon 3(C) of the ABA Judicial Code of Conduct, as is the Florida Code of Judicial Conduct. Section "455 was amended to bring the statutory grounds for disqualification of judges into conformity with the recently adopted Canon 3(C) of the Code of Judicial Conduct relating to disqualification of judges for bias, prejudice, or conflict of

Footnote continued

disclose his relationship with Loyola University. Defendant learned of Judge Collins' involvement with Loyola ten months after the entry of final judgment in favor of plaintiff. Thereupon, defendant filed a motion requesting that the orders entered by Judge Collins be vacated because he was disqualified to act in the matter.[16] The Supreme Court held:

> It is remarkable--and quite inexcusable--that Judge Collins failed to recuse himself on March 24, 1982. A full disclosure at that time would have completely removed any basis for questioning the judge's impartiality and would have made it possible for a different judge to decide whether the interests--and appearance--of justice would have been served by a retrial. Another two-day evidentiary hearing would surely have been less burdensome and less embarrassing than the protracted proceedings that resulted from Judge Collins' nonrecusal and

---

Footnote continued from previous page

interest." See H.R. Rep. No. 93, 93d Congress, 2d Sess. (1974).

16 Judge Collins claimed that he had no actual knowledge of the pending transaction between Plaintiff and Loyola due to his absence from a meeting of the board of trustees. Judge Collins also insisted that since Loyola was not a party of record, there was no appearance of bias.

> non disclosure. Moreover, as the Court of Appeals correctly noted, Judge Collins' failure to disqualify himself on March 24, 1982, also constituted a violation of Sec. 455(b)(4), which disqualifies a judge if he "knows that he, individually or as a fiduciary, . . . has a financial interest in the subject matter in controversy or is a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding." This separate violation of Sec. 455 further compels the conclusion that vacatur was an appropriate remedy; by his silence, Judge Collins deprived respondent of a basis for making a timely motion for a new trial and also deprived it of an issue on direct appeal.

Id., at 866-867.

The preceding passage is quite instructive here. Judge Turner represented the estate of Harold Sims, while still a lawyer.[17] Again while still a lawyer, Judge Turner filed an initial petition for the administration of Harold Sims' estate on April 14, 1978 (the same month that Mr. Steinhorst was convicted) and several subsequent documents within the months that immediately followed. Subsequently, Judge Turner was appointed to the bench of the Fourteenth Judicial Circuit. However, the circuit court records for the Fourteenth Judicial Circuit (Probate Division) do not reflect that Judge Turner ever

---

17 It is worth noting that Mr. Steinhorst was the only defendant indicted and convicted for Sims' death.

withdrew from the representation of Sims' estate. Judge Turner apparently failed to properly close the estate. On April 16, 1986, shortly after Judge Turner initially denied Mr. Steinhorst's Rule 3.850 motion without notice to the parties, the clerk of the Circuit Court for Bay County instituted proceedings to close the probate file of Harold Sims due to Judge Turner's failure to file the final accounting and petition for discharge (which should have been filed on or before April 14, 1979). Judge Turner never filed the final Accounting and Petition for Discharge as required by § 733.902(l) Florida Statutes, and the probate file was finally closed on May 1, 1986 due to inactivity. A search of the court records has failed to uncover any materials indicating that Judge Turner ever transferred the administration of the estate to another lawyer upon his appointment to the bench.

Moreover, on April 16, 1986, the Clerk of the Circuit Court in Bay County served a notice of hearing on Judge Turner on an order to show cause why the inactive Sims probate file should not be closed. MRJ ROA 97. At that time Judge Turner must have realized that he was still the attorney of record in Sims' probate case, yet he still chose not to inform Mr. Steinhorst's attorney of the conflict, as he was required to do pursuant to Canon 3C of the Florida Code of Judicial Conduct. Judge Turner had ample opportunity to advise Mr. Steinhorst's counsel of the conflict, as the Rule 3.850 motion was again before him in November 1986, when he vacated his prior order and reconsidered the matter. Additionally, the matter was again before him after the Florida Supreme Court vacated and remanded his Order denying Rule 3.850 relief due to his failure to review the record on appeal.

Interestingly, Judge Turner offered to recuse himself in the trial of a co-defendant less than five years earlier, even though that co-defendant (Hughes) was not charged in the death of Harold Sims. Certainly, if there was a reason for recusal by Judge Turner in the trial of co-defendant Hughes, who was not charged in the death of Sims, the same action should have been

taken in a proceeding involving the individual convicted of killing Sims.

The Liljeberg Court created a three-prong test to determine when a judgment should be vacated: "the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process. We must continuously bear in mind that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" Liljeberg, 486 U.S. at 860.

Examining each of the components of the Liljeberg test in turn, the conclusion is clear: the judgment must be vacated. Concerning the first prong, in this case the risk of injustice is overwhelming: Mr. Steinhorst is facing execution. There can be no greater injustice than for a capital case to be heard by a judge who had a blatant conflict of interest and obvious sympathy for the victim. This is especially true in light of the fact that neither of his co-defendants, each of whom were considered equally blameworthy by the sentencing judge, are facing a death penalty. See, MRJ RDA 21-26, affidavit of Justice Adkins. Second, there is a high probability that denying relief in this case will result in injustice in other cases. The message that the Court will send is clear: judges can openly disregard the Judicial Code of Conduct, and nothing will come of it. Finally, the public's confidence in the judiciary will certainly be undermined. Judge Turner was the attorney of record in Sims' probate case while simultaneously passing judgment on the man convicted of killing Sims. This case therefore passes all three prongs of the Liljeberg test.

Moreover, like Judge Collins' actions in Liljeberg, Judge Turner's silence deprived Mr. Steinhorst of the basis for making a timely motion for disqualification. It is submitted that Mr. Hughes' counsel would not have learned of the conflict had Judge Turner not so advised him in 1981. Similarly, Mr. Steinhorst's counsel was given no notice of the conflict during

the entire two year period that Judge Turner had this case before him. Therefore, any delay in filing the motion to vacate Judge Turner's rulings is attributable to Judge Turner and, indeed, to the State.

Judge Turner had numerous opportunities to inform Mr. Steinhorst's attorney of his relationship with Sims' estate. His failure to do so, and the fact that he had already disqualified himself from hearing the case, render his 1988 judgment void. The State was also aware of Judge Turner's representation of Sims' Estate and his recusal in the Hughes case. Yet the State failed to raise the issue or inform Mr. Steinhorst's counsel. Thus, the court erred in not finding that the correct remedy is vacation of Judge Turner's void judgment denying the Steinhorst Rule 3.850 motion.

THE COURT ERRED IN FINDING THE 1.540 MOTION TIME BARRED

As the affidavits of Christian Cox and Ian Haigler establish, and as Mr. Steinhorst would have established through the testimony of additional witnesses if he had been given the opportunity, Mr. Steinhorst's counsel was unaware of Judge Turner's conflict of interest and his recusal from Hughes' case until September 1991, at which time he promptly filed his Rule 1.540 motion.[18] Hence, Mr. Steinhorst's motion under Rule 1.540(b)(4) was filed within a "reasonable time."

---

18 Indeed, the State apparently concedes that Mr. Steinhorst did not discover the conflict of interest until 1991.

As the affidavits further establish, individual working on behalf of Mr. Steinhorst made a good faith, diligent effort to uncover any possible conflict and to search courthouse records back in 1986, when this matter was before Judge Turner. Those records were incomplete and in disarray. Despite diligent, good faith efforts, the conflict was not discovered until late 1991, three years after the entry of Judge Turner's order denying Rule 3.850 relief. Mr. Steinhorst should not suffer a violation of his due process rights due to the judge's failure to disclose the blatant conflict.

In Osceola Farms Co. v. Sanchez, 238 So. 2d 477 (Fla. 4th DCA 1970), the court considered a Rule 1.540 motion filed more than a year after the entry of a void judgment. The Osceola court held:

> Under the specific provisions of Rule 1.540(b) F.R.C.P., a motion to set aside a final judgment bottomed upon the reason that the judgment is void is not subject to the one-year limitation but must be brought within a reasonable time. We glean from the record that defendant's motion to set aside default and final judgment was filed when knowledge first came to the defendant that the plaintiff was seeking satisfaction of final judgment. Such, in our opinion is within the reasonable time requirement of the rule.

Id., at 480. Osceola demonstrates not only the correctness of using Rule 1.540 to vacate a void judgment but also that a motion filed as soon as the movant learns of the basis for the judgment being void is timely within the meaning of Rule 1.540. Id.

Additionally, the United States Supreme Court has held that Rule 60(b) authorizes a court to set aside "a void judgment" without regard to the one-year limitation applicable to motions to set aside on some other grounds. Klapprott v.

United States, 336 U.S. 942, 944 (1949). Thus, it is abundantly clear that a void judgment is never barred by time.

In the instant case, Mr. Steinhorst filed his Motion For Relief From Judgment as soon as he learned of the relationship of Judge Turner and Harold Sims' estate. Thus, contrary to the Court's findings, the Motion For Relief From Judgment was proper, and it was timely filed.

THE COURT ERRED IN FINDING THAT PREJUDICE NEED BE SHOWN

In denying the Motion For Relief From Judgment, the Court erred in implying that Mr. Steinhorst had to demonstrate actual bias to prevail on his motion. Adopting the State's argument verbatim, the court stated that Mr. Steinhorst's claim "is based on Defendant's imagined bias of Judge W. Fred Turner without any showing under F.S. 38.01 that Judge Turner appeared as a party of record in this case." See MRJ ROA 67-68, 108-09.

First, the bias alleged by Mr. Steinhorst is not "imagined". The conflict of interest is clear. See, Pistorino v. Ferguson, 386 So. 2d 65, 67 (Fla. 3d DCA 1980) (judge's spontaneous commitment to recuse himself at the option of counsel is convincing evidence of his own awareness of bias). Furthermore, the court's statement does not reflect the current state of the law. The test for the appearance of judicial bias or prejudice is an objective, "reasonable man" test. See, e.g., Parliament Ins. Co. v. Hanson, 676 F.2d 1069 (11th Cir. 1982); Hayslip v. Douglas, 400 So. 2d 553 (Fla. 4th DCA 1981).

Second, contrary to the Court's holding, and as noted above, the law does not require a showing of actual bias or prejudice by the judge. Similarly, the law does not require that the judge be a party of record in a proceeding, in order to demonstrate an appearance of impartiality, thus necessitating

disqualification. In the instant case, a reasonable person informed of the facts that Judge Turner was the attorney of record for the estate of Harold Sims, while simultaneously considering a post-conviction relief motion by the man convicted of killing Sims would doubt the judge's impartiality.

Moreover, several states have interpreted provisions of their judicial code of conduct identical to Canon 3(C) of the Florida Judicial Code of Conduct as requiring sua sponte disqualification whenever a judge's impartiality might reasonably be questioned, without any request from defense counsel.

> These principles have been reinforced by our Code of Judicial Conduct. Canon 3C(l)(a) requires that a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned including, but not limited to, instances where: (a) he has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding. In the context of our consideration of other subsections of this Canon, we have held repeatedly that it imports an objective standard. Pearson v. Parsons, 541 So. 2d 447, 454 (Miss.1989); Jenkins v. Forrest General Hospital, 538 So. 2d 1162, 1163 (Miss. 1988); Cantrell v. State, 507 So. 2d 325, 328 (Miss.1986); Rutland v. Pridgen, 493 So. 2d 952, 954 (Miss. 1986); see also Craig v. Barber, 524 So. 2d 974, 978 (Miss.1988). Moreover, the Canon enjoys the status of law such that we enforce it rigorously, notwithstanding the lack of a litigant's specific demand.

Collins v. Dixie Transport, Inc., 543 So. 2d 160, 166 (Miss. 1989).

In a similar case, In The Matter Of The Estate Of Frank Risovi, 429 N.W. 2d 404 (N.D. 1988), a judge had given legal advice to the party contesting a will prior to taking the bench. Prior to recusing himself, the judge made certain rulings. The will contestant moved to vacate the previous orders, arguing that they were void because the judge should have disqualified himself prior to making the rulings. The North Dakota Supreme Court agreed, stating as follows:

> It is sufficient to disqualify a judge that he had given legal advice to a party in connection with the subject matter before litigation began; it is not necessary that he was connected with the particular matter as a pending suit. As the United States Supreme Court reiterated recently in a more difficult decision about judicial disqualification: "We must continuously bear in mind that 'to perform its high function in the best way "justice must satisfy the appearance of justice."'" Liljeberg v. Health Services Acquisition Corp., --- U.S. ---, 108 S. Ct. 2194, 2204, 100 L. Ed. 2d 855 (1988).

Id., at 406.

The Arkansas Supreme Court has held that Judges must disqualify themselves sua sponte when they realize that their impartiality may be objectively questioned, Adams v. State, 269 Ark. 548, 601 S.W.2d 881 (Ark. 1980).

> Other courts have held, under similar disqualification provisions of their judicial conduct rules, that disqualification is mandatory unless specifically stated to be waivable in the rules. For example, Green v. State, 21 Ark. App. 80, 729 S.W. 2d 17, 20 (1987) said: "'We hold that Canon 3C is applicable in . . . civil cases, . . . that no request to disqualify and no

objection for failure to disqualify is necessary to be made either by a trial attorney or by a party representing himself, that the trial judge must take the initiative to disqualify or, in the alternative, to comply with the procedure set out in Canon 3D, that this Court can, on its own initiative, examine the record to notice compliance or noncompliance, and that failure to comply is reversible error." (citation omitted) "Although we do not mean to impugn the integrity of the trial judge, we believe the law simply required a disqualification under the circumstances relating to the . . . case." [citations omitted]. In Grant v. State, 700 S.W. .2d 170, 171 (Mo. App. 1985), the appeals court vacated judgment and "any and all orders or rulings" made by the disqualified judge and remanded, saying "The duty of [the judge] to disqualify himself was absolute. It did not 'depend on the waiver of the issue by the parties.' [citations omitted]. Although . . . Canon 3D permits 'remittal of disqualification' in certain situations, the instant situation is not within those exceptions." See Edmonson v. Farris, 263 Ark. 505, 565 S.W. 2d 617 (1978); Haire v. Cook, 237 Ga. 639, 229 S.E. 2d 436, 438 (1976) ("Disqualification under Canon 3C is mandatory." However, where 3D permits waiver, it need not be in writing and may be implied.) Citizens First Nat. Bank v. Hoyt, 297 N.W.2d 329 (Iowa 1980) (disqualification is ordinarily automatic and should be on judge's own initiative; however, where waiver is permitted it may be implied as well as express). See also, United States v. Nobel, 696 F. 2d 231 (3rd Cir. 1982) (interpretation of comparable federal statute).

Id., at 883.

In Adams, the presiding judge at the defendant's arraignment was the prosecutor's uncle. At arraignment the defendant was not represented by an attorney and did not object to the uncle-nephew relationship. At a subsequent post-conviction proceeding, defense counsel also failed to object to the earlier Canon violation. However, the Arkansas Supreme Court raised the issue sua sponte and remanded the case with instructions that it be heard before an impartial judge. The Adams court noted that defense counsel's failure to raise the issue of non-compliance with the disqualification Canon was not relevant:

> We regard these failures to request compliance and object to non-compliance as being immaterial because the sense of Canon 3C is that the judge should take the initiative under Canon 3C, and also under Canon 3D if the judge elects to take advantage of the Canon 3D procedure.

Id. at 884. The Arkansas judicial disqualification Canon is identical to the Florida disqualification Canon and should be interpreted in the same manner.

As the preceding case citations indicate, and as the Court erred in ignoring, any time there is an appearance of bias, prejudice or judicial impartiality, the judge is under a duty to disqualify himself on his own initiative. Furthermore, the failure to object to a potentially biased judge does not waive the matter. At the very least, the judge must disclose on the record the basis for his potential bias, then allow the parties and their attorneys to decide whether or not to move for disqualification. Neither was done here.

THE COURT ERRED IN IGNORING THE UNDISPUTED EVIDENCE THAT JUSTICE ADKINS, HAD HE HEARD THE 3.850, WOULD HAVE IMPOSED LIFE SENTENCES

Even if the Court were correct and a showing of prejudice required, the patent prejudice resulting to Walter Steinhorst as a result of Judge Turner's conflict is most easily demonstrated by additional new information provided by Justice James Adkins who, as a Florida Supreme Court Justice sitting by special designation, presided over the separate trials of Walter Steinhorst and co-defendant David Goodwin, and sentenced both of them to death. Justice Adkins, who but for the unique circumstances of being a sitting Supreme Court Justice would have heard Mr. Steinhorst's 3.850 motion, has stated that if he had heard the 3.850, he in all probability would have imposed a life sentence. See, MRJ ROA 25-26, Adkins Aff., para. 14. Since the Florida Supreme Court reduced David Goodwin's death sentence to life, Justice Adkins firmly believes that it should have done the same for Walter Steinhorst, and that in view of the fact that the third co-defendant, and another possible triggerman, Charlie Hughes, served only five years of a mere fifteen year sentence, it would be grossly unfair for Mr. Steinhorst to be executed. In this regard he has stated that this sentence "is a horrible, disproportionate situation that ought to be corrected." See, MRJ ROA 25, Adkins Aff., para. 13.

Had he been the judge hearing Steinhorst's 3.850 motion, Justice Adkins has stated that he "would have, at a minimum, raised the question of the sentences being disproportionate and requested briefs from the lawyers on these and other issues, and in all probability I would have granted Mr. Steinhorst's 3.850 motion and changed the sentence to life imprisonment." See, MRJ RDA 25-26, Adkins Aff., para. 14.

In ignoring these facts, the Court committed reversible error.

VIII. CONCLUSION

For all of the foregoing reasons, - particularly the undisclosed conflict of Judge Turner which irreparably undermines the reliability of the findings and determinations - Mr. Steinhorst respectfully requests that this Court grant relief from the judgment entered on his 3.850 motion, and order that a new hearing be conducted on his 3.850 motion before an impartial judge.

DATED: October 28, 1993

Respectfully submitted,
Stephen D. Alexander
Anthony G. Graham
FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON
(A Partnership Including
Professional Corporations)
725 South Figueroa Street
Suite 3890
Los Angeles, California 90017
(213) 689-5800

By: /s/ Stephen D. Alexander
Attorneys for Appellant

IN THE CIRCUIT COURT, FOURTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR BAY COUNTY

STATE OF FLORIDA,

Plaintiff,

vs. CASE NO. 77-708/709

WALTER GALE STEINHORST,

Defendant.

ORDER GRANTING DEFENDANT'S REQUEST FOR REHEARING; DENYING DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT AND GRANTING STATE OF FLORIDA'S MOTION TO DISMISS

THIS CAUSE having come before the Court upon the Defendant, Walter Gale Steinhorst's, Motion for Relief from Judgment and the State of Florida's Motion to Dismiss and response to Motion for Relief from Judgment and the Defendant's Motion for Rehearing and Memorandum of Law in Support Thereof filed subsequent to this Court's order dated April 9, 1993 and the Court, having heard the argument of counsel through these written memoranda, finds that the Court's order of April 9, 1993 should be set aside to clarify the Court's rulings on the motions pending before it. The Court further finds the memorandum in the file fully covers all the issues presented to the Court for ruling.

Specifically, this Court finds that Rule 1.540, Florida Rules of Civil Procedure, is not the proper method to collaterally attack a criminal judgment and sentence under Florida law. The Defendant has a method under Florida law

through the use of Rule 3.850, Florida Rules of Criminal Procedure, to collaterally attack his criminal judgment and sentence. However, his request for relief under that rule would be untimely and he has also litigated under Rule 3.850 previously. The Defendant appealed Judge W. Fred Turner's judgment on five (5) grounds of which the Florida Supreme Court stated only two (2), the Brady and Hitchcock, claim, merited discussion. Steinhorst v. State, 574 So.2d 1075 at 1076 (Fla. 1991).

The Court also finds that should Rule 1.540 be a valid ground to seek collateral attack, the judgment is not void because the Defendant's claim is barred by time, and is based upon Defendant's imagined bias of Judge W. Fred Turner without any showing under F.S. 38.01 that Judge W. Fred Turner appeared as a party of record in this case. Judge Turner recused himself in Hughes' case in June, 1981. In February, 1986, the Defendant filed the 3.850 motion which was denied after several hearings in June of 1988. In January, 1991, the Florida Supreme Court denied the post conviction appeal. The current 1.540 motion is filed October, 1991, almost ten (10) years after Judge Turner recused himself in Hughes' case.

Finally, F.S. 38.06 states that orders entered by judges subject to disqualification are not void and are not subject to collateral attack. The Defendant's arguments ignore Florida law and the Florida Statutes. It is therefore

ORDERED AND ADJUDGED that this Court's order dated April 9, 1993, be and is hereby set aside. It is further

ORDERED AND ADJUDGED that the Defendant, Walter Gale Steinhorst's, Motion for Relief from Judgment be and is hereby denied. It is further

ORDERED AND ADJUDGED that the State of Florida's Motion to Dismiss be and is hereby granted.

DONE AND ORDERED this 8th day of July, 1993 at Panama City, Bay County, Florida.

/s/ Don T. Sirmons
DON T. SIRMONS, Circuit Judge

State v. Steinhorst
#77-708/709

copies to:
Alton O. Paulk, Esq.
ASA

Stephen D. Alexander, Esq.
Defense Counsel

United States District Court
Northern District of Florida

Florida Supreme Court Clerk's Office
ATTN: Tanya

IN THE CIRCUIT COURT OF THE
FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR BAY COUNTY,
FLORIDA

STATE OF FLORIDA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Nos. 77-708, 77-709
	)	
WALTER GALE STEINHORST	)	
	)	
Defendant.	)	
	)	

MOTION FOR RELIEF FROM JUDGMENT

Pursuant to Florida Rule of Civil Procedure 1.540(b)(4), and the inherent equitable powers of this Court, Walter Gale Steinhorst respectfully moves this Court for relief from the judgment entered June 23, 1988 by Circuit Judge W. Fred Turner on defendant's Motion for Post-Conviction Relief made pursuant to Fla. R. Crim. Proc. 3.850 ("3.580 Motion" or "3.850"). As the following discussion demonstrates, Mr. Steinhorst's attorneys just recently discovered that Judge Turner had previously represented the estate of Harold Sims, one of the victims in this matter, and, as a result of that representation, had previously recused himself from presiding over the trial of co-defendant Charlie Hughes. Such a blatant conflict of interest should have similarly compelled Judge Turner to recuse himself from deciding Mr. Steinhorst's 3.850.

The prejudicial effect of this conflict is only made more obvious by the fact that Mr. Steinhorst's trial judge, Justice James C. Adkins, a former Chief Justice of the Florida Supreme Court, has stated that had he sat as the 3.850 judge (as he would have but for the fact that he was a Supreme Court justice sitting by special designation), he would have in all probability granted Mr. Steinhorst's motion and imposed a life sentence. Affidavit of James C. Adkins, para. 14, attached hereto as Exhibit A. Judge Turner's inexcusable failure to advise counsel of his conflict of interest deprived Mr. Steinhorst of his fundamental right to due process of law, and, accordingly, the 3.850 judgment should be vacated, so that Mr. Steinhorst may present his 3.850 motion to an impartial fact finder.

I. PROCEDURAL BACKGROUND

For purposes of this motion, the procedural background of this case is summarized as follows:

On November 30, 1977, Walter Steinhorst, David Goodwin and Charlie Hughes were indicted by the Panama City Grand Jury for the first degree murders of Douglas Hood, Sheila McAdams and Sandra McAdams. Walter Steinhorst was also indicted for the premeditated first degree murder of Harold Sims. The three defendants' cases were severed, and Mr. Steinhorst's trial commenced on April 24, 1978 in the Circuit Court of the Fourteenth Judicial Circuit of the State of Florida, in and for Bay County, Panama City (the "Circuit Court") before Justice James C. Adkins, who was sitting by special

designation.[1] The jury convicted Mr. Steinhorst of first degree murder on all four counts. It was not stated whether the verdicts were based on a finding of felony or premeditated murder. Following a jury recommendation, Mr. Steinhorst was sentenced to death on three of the four counts.

On February 13, 1986, Mr. Steinhorst filed his 3.850 Motion in the Circuit Court. Judge Turner denied the motion on March 24, 1986 without his ever having seen, let alone read, the trial record or any briefs, or having conducted an evidentiary hearing.[2] Neither Mr. Steinhorst nor his attorneys

---

1 Justice Adkins also presided, several weeks later, over the separate trial of co-defendant David Goodwin. The other codefendant, Charlie Hughes, was a fugitive from justice until 1981.

2 Judge Turner's order, which was entered without the benefit of any review of the record, briefs, factual findings, evidentiary hearing, or even a response from the State, read in full as follows:

THIS CAUSE coming before the Court on Motion of the Defendant, and the Court beng fully advised in these premises, the Court makes the following findings:

1. The claims made by the Defendant not dealing with ineffectiveness of counsel are not properly cognizable because they were raised, or could have been raised, on appeal. See attached opinion of the Supreme Court.

2. To the extent that the claims of ineffectiveness of counsel are made "upon information and belief", those claims can not be raised pursuant to Rule

Footnote continued

received notice of this denial. Rather, his attorneys first learned of the decision on November 6, 1986 by reading a press release.

On November 14, 1986, Mr. Steinhorst (1) filed in the Circuit Court a motion to vacate the order of March 24, 1986 and to reconsider his request for an evidentiary hearing on an amended 3.850 Motion and (2) sought a stay of execution. On November 20, 1986, Judge Turner granted Mr. Steinhorst's request to vacate the March 24, 1986 order but again

---

Footnote continued from previous page

3.850. The remaining claims of ineffectiveness are attacks on strategy of counsel which do not state any errors or omissions which would constitute ineffectiveness under Strickland v. Washington, 104 S.Ct. 2052. Defendant likewise has failed to establish a reasonable probability of a different result had the omission or act not occurred.

Therefore, Defendant's Motion to Vacate, Set Aside, or Correct Conviction and Sentence is hereby DENIED.

DONE AND ORDERED this 24th day of March, 1986.

See Order dated March 24, 1986, attached hereto as Exhibit B. The most remarkable aspects of the order are Judge Turner's conclusions that (1) only ineffective assistance of counsel claims are cognizable in a 3.850 motion, and (2) counsel's conduct was based on strategic decisions that did not violate Strickland. The latter finding was made without any factual basis and despite Judge Turner's lack of access to the record in the case.

summarily denied the Rule 3.850 Motion and denied the request for a stay of execution.

On the following day, Mr. Steinhorst filed in the Supreme Court of Florida an appeal of the denial of the 3.850 Motion and a request for a stay of execution. On November 26, 1986, the Supreme Court of Florida granted defendant's application for a stay of execution, vacated Judge Turner's order and remanded the case for further appropriate proceedings under Rule 3.850.[3]

On September 16-18, 1987, Judge Turner conducted a hearing on the 3.850 Motion and arguments were held on June 16, 1988. Judge Turner denied that motion on June 23, 1988.[4] The decision was affirmed on appeal on January 15, 1991.

---

3 In so holding, the Florida Supreme Court observed that Judge Turner had not even bothered to "examine the trial record and did not have the record before him when ruling on appellant's ... motion," in violation of Rule 3.850. Steinhorst v. State, 498 So. 2d 414, 415 (Fla. 1986). Consequently, Judge Turner also violated Rule 3.850 by failing to attach portions of the record conclusively showing that Mr. Steinhorst was entitled to no relief.

4 In the course of reviewing materials for the record on appeal with the Assistant State Attorney, defendant's counsel learned that yet again Judge Turner had failed to read the trial record. The deputy clerk of the trial court informed defendant's counsel that the clerk's office did not have the transcript of Mr. Steinhorst's original trial because the trial court had never received that transcript back from the Supreme Court and it had no copy. Judge Turner confirmed this omission in his sue sponte order dated August 3, 1988 by acknowledging that

Footnote continued

Footnote continued from previous page

"the original trial transcript ... is lodged in the Supreme Court of Florida." Record on Appeal, p. 799.

II. THE APPROPRIATE PROCEDURE FOR REOPENING THE JUDGMENT IS RULE 1.540

Florida Rule of Civil Procedure 1.540(b) provides, in part,

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, decree, order or proceeding for the following reasons: ... (4) the judgment or decree is void... The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, decree, order or proceeding was entered or taken. ... Writs of coram nobis, coram vobis, audita querela and bills of review and bills in the nature of a bill of review are abolished and the procedure for obtaining any relief from a judgment or decree shall be by motion as prescribed in these rules or by an independent action.

This is a motion under Rule 1.540(b)(4), not a successor motion under Florida Rule of Criminal Procedure 3.850. A 3.850 motion, by its very terms, is a motion to set aside the conviction and sentence. Here, Mr. Steinhorst is not attempting in this proceeding to set aside his conviction and sentence but rather, to set aside the 3.850 judgment entered by Judge Turner. A 3.850 motion therefore would not be the appropriate vehicle for challenging that 3.850 judgment.

Although Rule 3.850 is a rule of criminal procedure, proceedings under the rule are not steps in the criminal prosecution but are in the nature of independent, collateral civil actions. State v. Lasley, 507 So. 2d 711 (Fla. 2nd DCA 1987) ("Like a habeas corpus proceeding an action under rule 3.850 is considered civil in nature and collateral to the criminal prosecution which resulted in the judgment of conviction,

notwithstanding the inclusion of rule 3.850 within the criminal rules); State v. White, 470 So. 2d 1377, 1378 (Fla. 1985) (the "post-conviction collateral remedies [such as those provided by rule 3.850 and writs of error coram nobis and habeas corpus] are not steps in a criminal prosecution but are in the nature of independent collateral civil actions"); Tolar v. State, 196 So. 2d 1, 3 (Fla. 4th DCA 1967). Thus, the proceedings have been said to be governed by the rules of civil procedure, except where those rules are inconsistent with the specific provisions of Rule 3.850. Green v. State, 280 So. 2d 701, 702 (Fla. 4th DCA 1973).

Where there is no existing rule of criminal procedure that fits the particular situation sought to be remedied, a litigant must resort to the existing rules of civil procedure. See Luhrs v. State, 394 So. 2d 137, 139 n.1 (Fla. 5th DCA 1981) (citing Bocas v. Wainwright, 223 So. 2d 316, 317 (Fla. 1969) for the proposition that a court may adopt a civil rule --Rule 1.540(a) concerning correction of clerical errors -- for use in a criminal case when no comparable criminal rule exists). See also Tolar v. State, 196 So. 2d at 4 ("Rule 1 [now Rule 3.850], like [28 U.S.C.] § 2255, is not all comprehensive or exclusive of relief otherwise available by motion under the classical writs or under Rule 1.38 (now rule 1.540) Rules of Civil Procedure.").

Rule 3.850 was patterned after the federal post-conviction statute, 28 U.S.C. § 2255, and cases decided under the federal statute serve as a guide to the proper application and interpretation of the Florida rule where there is no Florida precedent. Roy v. Wainwright, 151 So. 2d 825, 828 (Fla. 1963); Tolar v. State, 196 So. 2d at 3. When a petitioner seeks to set aside a federal habeas determination, the avenue for doing so is Federal Rule of Civil Procedure 60, which is the federal counterpart to Fla. Rule Civ. Proc. 1.540. See, e.g., Gray v. Estelle, 574 F.2d 209 (5th Cir. 1978) (citing Pitchess v. Davis, 421 U.S. 482 1975))- In fact, it is clear from the face of Rule 1.540 that it was modeled after Fed. Rule Civ. P. 60. See DeClaire v. Yohanan, 453 So. 2d 375, 377 (Fla. 1984).

Hence, Rule 1.540 is the appropriate vehicle for attacking a 3.850 judgment that was entered by a judge who was subject to an unrevealed conflict of interest. See Aetna Life & Casualty Co. v. Thorn, 319 So. 2d 82 (Fla. 3rd DCA 1975). In Aetna, the appellant moved to set aside the final judgment after learning that the judge had an affinity of relationship in the case. Aetna did not learn of the conflict until after the entry of the final judgment. The court noted that "[a] judge occupies such a particular position in the affairs of other men that not only must he be free of evil intent but he must also avoid the appearance of evil." Id. at 84. The court also noted that Fla. Stat. § 38.02 is not the exclusive remedy for the disqualification of a judge, because that statute by its terms applies only to those cases in which a final judgment has not been entered. Id. The court then reversed the order denying appellant's 1.540 motion and remanded the case to the trial court with directions to proceed to a hearing upon that motion. Id. at 85.

For the reasons discussed below, this Court should set aside the 3.850 judgment entered by Judge Turner and order a new 3.850 determination before an impartial fact finder.

III. MR. STEINHORST SHOULD BE GRANTED RELIEF FROM THE 3.850 JUDGMENT AS A RESULT OF JUDGE TURNER'S UNDISCLOSED BLATANT CONFLICT OF INTEREST

A. Judge Turner Had A Clear Conflict of Interest

In the recent course of investigation of this case, attorneys for Mr. Steinhorst have discovered that Judge Turner had a serious conflict of interest which compelled him to recuse himself from considering the 3.850 motion. Judge Turner had represented the estate of Harold Sims, one of the victims in this case, and had had previous contact with the Sims family, and on the basis of that representation had sue sponte advised counsel for co-defendant Charlie Hughes that he would recuse

himself, upon request, from presiding over Mr. Hughes' trial. See Order dated July 9, 1981, attached hereto as Exhibit C. Hughes, who was a fugitive from justice until 1981, was indicted on the same charges as Walter Steinhorst and tried soon after his capture. As a result of Judge Turner's disclosure, the Hughes trial was promptly reassigned to another circuit judge. See Order of Consolidation and Reassignment, dated July 15, 1981, attached hereto as Exhibit D.

Despite the fact that he had previously advised Hughes' counsel of and signed an order recognizing his "conflict of interest," Judge Turner failed to inform Mr. Steinhorst's counsel of this blatant conflict when counsel appeared before him in 1986 to prosecute defendant's 3.850 motion.[5] The State Attorney's office, which was also aware of this conflict as a result of having prosecuted Mr. Hughes, similarly failed to inform Mr. Steinhorst's counsel of this matter.[6]

Judge Turner's failure to disqualify himself from hearing Mr. Steinhorst's 3.850 Motion is a clear violation of

---

5 Nor did Judge Turner advise counsel of this conflict at any time during the more than two year time frame in which he dealt with Mr. Steinhorst's 3.850 motion.

6 State Attorney James Appleman's office both prosecuted Charlie Hughes in 1981 and opposed Mr. Steinhorst's 3.850 motion in 1986-87. Current counsel for Mr. Steinhorst, who are out-ofstate pro bono counsel, did not become involved in the Steinhorst case until 1983.

Canon 3, subd. C(1) of the Code of Judicial Conduct[7] which provides in relevant part:

> "C. Disqualification
>
> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings;
>
> (b) he served as a lawyer in the matter in controversy..."

The case law in this jurisdiction also clearly establishes that "[t]he burden is upon the individual judge to determine his qualification to sit on a particular case." Aetna Life & Casualty Company v. Thorn, 319 So. 2d 82, 84 (Fla. 3d D.C.A. 1975). At the core of the due process guarantee of a fair trial is the principle that every litigant is entitled to nothing less than the "cold neutrality of an impartial judge " State ex rel. Davis v. Parks, 141 Fla. 516, 194 So. 613 (Fla. 1939); Pistorino v Ferguson, 386 So. 2d 65, 67 (Fla. 3d D.C.A. 1980); State v.

---

7 The Preface to the Code of Judicial Conduct states that the provisions of the Code and the standards that judges should observe "are mandatory unless otherwise indicated." See also Department of Revenue v. Colder, 322 So. 2d 1, 3 n.8 (Fla. 1975).

Steele, 348 So. 2d 398, 401 (Fla. 3d D.C.A. 1977). Where the judge is conscious of any bias or prejudice which might influence his official action against any party to the litigation, he should decline to officiate whether challenged or not. Pistorino v. Ferguson, 386 So. 2d at 67; McGregor v. Hammock, 101 Fla. 1170, 132 So. 815 (Fla. 1931); State v. Cannon, 166 So. 2d 625, 627 (Fla. 3d D.C.A. 1964). See also State ex rel. Mickle v. Rowe, 100 Fla. 1382, 1385, 131 So. 331, 332 (Flat 1930) ("It is the duty of the courts to scrupulously guard [the] right of the litigant [to an impartial judge] and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought in question. The exercise of any other policy tends to discredit and place the judiciary in a compromising attitude which is bad for the administration of justice.")

No judge under any circumstances is warranted in sitting in the trial of a cause whose neutrality is shadowed or even questioned. . . . It is a matter of no concern what judge presides in a particular cause, but it is a matter of grave concern that justice be administered with dispatch, without fear or favor or the suspicion of such attributes. . . . The judiciary cannot be too circumspect, neither should it be reluctant to retire from a cause under circumstances that would shake the confidence of litigants in a fair and impartial adjudication of the issues raised. Dickinson v. Parks, 104 Fla. 577, 582-84, 140 So. 459, 462 (1932).

It is clear that in this case Judge Turner failed to fulfill his judicial duties. The question of disqualification of a judge focuses on those matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his ability to act fairly and impartially. Livingston v. State, 441 So. 2d 1083, 1086 (1983). Under this standard a motion for disqualification clearly would have been granted since Judge Turner's prior representation of the Sims'

estate presents a clear situation where the Judge's impartiality could reasonably be questioned. Not only was Mr. Sims a victim in this case, but also much of the evidence presented at the 3.850 hearing pertained to the background and character of Mr. Sims and the fact that he and one of the other victims, Doug Hood, were not innocent victims as portrayed at the trial but rather were armed and went to Sandy Creek to "rip off" the marijuana that was being unloaded.

More importantly, Judge Turner's determination that his representation of the estate of Harold Sims disqualified him from presiding over Hughes' trial leaves no question that he was not qualified to hear defendant's 3.850 since both men were charged with having committed the same crimes. See Pistorino v. Ferguson, 386 So. 2d 65, 67 (Fla. 3d D.C.A. 1980) (judge's spontaneous commitment to recuse himself at the option of counsel is convincing evidence of his own awareness of bias).

The wide scope of the conflict at issue and the serious matters to which it pertains render the failure by Judge Turner to disclose this conflict inexcusable, and seriously undermine the reliability of his findings regarding Mr. Steinhorst's challenge to his convictions and death sentences.[8] If

---

8 Not surprisingly, this was not the first time that Judge Turner had deviated from properly fulfilling fundamental judicial duties. In October 1982, the Supreme Court of Florida, on recommendation from the Florida Judicial Qualification Commission, held that certain conduct by Judge Turner, which "[brought] the Judiciary into disrepute...", warranted public reprimand. See In re Turner, 421 So. 2d 1077 (Fla. 1982). That conduct included a "direct violation of the Code of Judicial Conduct" by initiating exparte communications with one of the parties to a custody matter; the deprivation of two individuals of "elementary due process" through the

Footnote continued

defendant's counsel had known of Judge Turner's conflict of interest at the time that defendant's 3.850 Motion was heard, they most certainly would have moved for his recusal.

B. Due to Judge Turner's Clear Conflict, the 3.850 Judgment is Null and Void

The 3.850 judgment entered against Mr. Steinhorst is null and void under Rule 1.540(b)(4). It is well established that a judgment entered by a judge with a disqualifying interest is void and should have no effect at all. See, e.g., American Construction Co. v. Jacksonville, Tampa and Key West Railway Co., 148 U.S. 372, 387-88 (1893) (where circuit judge was disqualified by law to take part in the case, decree entered by such judge is void and must be set aside); State ex rel. Central Farmers' Trust Co. v. Chillingworth, 107 Fla. 747, 143 So. 294 (1932) (a circuit judge who has a disqualifying interest in the litigation is ipso facto cut off and disqualified to make any order or decree in the cause, and any such order or decree entered by such judge, even when done in good faith and without knowledge of the disqualifying circumstances, is void); Hogan v. State, 89 Fla. 388, 104 So. 598 (1925) (recognizing right of every litigant to a trial by a

---

Footnote continued from previous page

"arrogant, arbitrary and capricious abuse of his powers as a Circuit Judge" and the "impeachment] [of] the public's confidence in the integrity and impartiality of the Judiciary" by failing "to observe elementary standards of judicial conduct" by arrogantly and improperly admonishing attorneys appearing before him. Id. at 1079-80.

tribunal uninfluenced by a taint of interest or partiality and holding that the orders entered by the disqualified judge were void).

The decision in Boyer v. State, 486 So. 2d 70 (DCA, Fourth District 1986) is instructive. Boyer involved an appeal of the denial of the defendant's 3.850 motion, in which he raised for the first time the issue that one of the judges who presided on his direct appeal should have recused himself based on the judge's prior involvement 16 years earlier. The District Court of Appeal, treating this prong of the 3.850 appeal as a petition for a writ of habeas corpus, held that "the judge's presence on the panel that reviewed appellant's conviction could not so flagrantly have affected appellant's due process rights as to void the appellate proceedings." Id. at 72. In so holding, the court concluded that the chances were remote that the judge's opinion was influenced by his prior involvement, and there were two other judges on the appellate panel that unanimously affirmed Boyer's conviction. See also Giuliano v. Wainwright, 416 So. 2d 1180 (Fla. 4th DCA 1982) (connection between the judge's former role in petitioner's earlier conviction and his position as a member of the appellate panel regarding a different conviction was too attenuated to mandate voiding the appellate decision in the latter case). Cf. Muina v. Hood, 516 So. 2d 1117 (Fla. 1st DCA 1987) (denying appeal of 1.540 motion wherein appellant claimed that final judgment entered six years before by biased judge was a nullity; court held that appellant's asserted grounds for disqualification -- that in a separate case the judge refused to grant a stay of execution and failed to send him a copy of the judgment -- had no factual basis and were insufficient to show a well-founded fear of prejudice).

These cases clearly contemplate that where there is a sufficient showing of judicial bias, such bias does render the judgment void. It is clear that Judge Turner's consideration of Mr. Steinhorst's 3.850 motion did "so flagrantly affect [Mr.

Steinhorst's] due process rights as to void the [3.850] proceedings." Boyer, 486 So. 2d at 72.

It is well established that any judgment entered in a manner that fails to comply with fundamental due process principles is void. Pennoyer v. Neff, 95 U.S. 714 (1878). Rule 3.850 proceedings are governed by due process principles, see Holland v. State, 503 So. 2d 1250, 1252 (Fla. 1987), and when Judge Turner presided at Mr. Steinhorst's 3.850 proceeding, he violated Mr. Steinhorst's fundamental due process right to an impartial tribunal. As stated in In re Murchison, 349 U.S. 133 (1955):

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This court has said, however, that "every procedure which would offer a possible temptation to the average man as a judge ... not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law."

Id. at 136 (citations omitted). See Mayberry v. Pennsylvania, 400 U.S. 455, 464-65 (1971) (disregard for the appearance of impartiality is a due process violation which voids a judgment of contempt); Johnson v. Mississippi, 403 U.S. 212, 215 (1971) (due process requires that criminal defendant's case be heard by an impartial judge); Tumey v. Ohio, 273 U.S. 510, 522 (1927) (to subject a defendant to trial in a criminal case involving his liberty or property before a judge having a direct, personal, substantial interest in convicting him is a denial of due process of law); Sandstrom v. Butterworth, 738 F.2d 1200 (llth Cir. 1984), cert. denied, 469 U.S. 1109 (1985) (acknowledging fundamental due process right to impartial

tribunal and affirming district court's order granting habeas corpus petition due to trial judge's failure to recuse himself from determining whether petitioner was in contempt of court); Scott v. Anderson, 405 So. 2d 228, 236 (Fla. 1st DCA 1981) (disregard for the appearance of impartiality is a due process violation which voids a judgment of contempt).

The conflict in the instant case was so obvious that Judge Turner, in co-defendant Charlie Hughes' case, sue sponte apprised his counsel of the conflict. As a matter of simple fairness, Mr. Steinhorst should have been given the same opportunity that Charlie Hughes was given. The duty was on the judge, and Mr. Steinhorst should not be penalized because Judge Turner revealed the conflict to Hughes but declined to do so for Mr. Steinhorst.

Rule 3.850 is an equitable remedy, patterned after its federal counterpart, 28 U.S.C. § 2255. Roy v. Wainwright, 151 So. 2d 825, 828 (Flat 1963). In a related context, the United States Supreme Court has repeatedly reaffirmed that "habeas corpus has traditionally been regarded as governed by equitable principles." Kuhlmann v. Wilson, 477 U.S. 436, 447 (1986) (quoting Fay v. Noia, 372 U.S. 391, 438 (1963)). This is a unique situation, and equity demands that Mr. Steinhorst be

given a fair and impartial 3.850 proceeding.[9] This is all the more true in a case in which a man's life is at stake.

C. Justice Adkins, Had He Heard the 3.850, Would Have Imposed Life Sentences

The patent prejudice resulting to Walter Steinhorst as a result of Judge Turner's conflict is most easily demonstrated by additional new information provided by Justice James Adkins who, as a Florida Supreme Court Justice sitting by special designation, presided over the separate trials of Walter Steinhorst and co-defendant David Goodwin, and sentenced both of them to death. Justice Adkins, who but for the unique circumstances of being a sitting Supreme Court Justice would have heard Mr. Steinhorst's 3.850 motion, has stated that if he had heard the 3.850, he in all probability would have imposed a life sentence. Adkins Aff. para. 14. Since the Florida Supreme Court reduced David Goodwin's death sentence to life, Justice Adkins firmly believes that it should have done the same for Walter Steinhorst, and that in view of the fact that the third codefendant, and another possible triggerman, Charlie Hughes, served only five years of a mere fifteen year sentence, it would be grossly unfair for Mr. Steinhorst to be executed. In this regard, he has stated that this sentence "is a horrible, disproportionate situation that ought to be corrected." Id.

---

9 Factual findings by a conflicted judge would not, of course, be entitled to any deference from a federal habeas court See 28 U.S.C. § 2254(d)(2) (factfinding process not adequate to afford a full and fair hearing), (6) (applicant did not receive full, fair and adequate hearing in the state court), and (7) (applicant was otherwise denied due process of law in the state court proceeding).

para. 13. Had he been the judge hearing Steinhorst's 3.850 motion, Justice Adkins has stated that he "would have, at a minimum, raised the question of the sentences being disproportionate and requested briefs from the lawyers on these and other issues, and in all probability I would have granted Mr. Steinhorst's 3.850 motion and changed the sentence to life imprisonment." Id. para. 14.

IV. CONCLUSION

For all of the foregoing reasons, Mr. Steinhorst respectfully requests that this Court grant relief from the judgment entered on his 3.850 motion, and order that a new hearing be conducted on his 3.850 motion.

DATED: October 4, 1991

Respectfully submitted,

Stephen D. Alexander
Fried, Frank, Harris, Shriver
& Jacobson
(A Partnership Including
Professional Corporations)
725 South Figueroa Street
Suite 3890
Los Angeles, California 90017
Attorney for Defendant

IN THE CIRCUIT COURT, FOURTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA. IN AND FOR BAY COUNTY

STATE OF FLORIDA,

Plaintiff,

- against - : CASE NO. 77-700CF

CHARLIE HUGHES,

Defendant.

O R D E R

This Court has heretofore made known to Counsel in this case that, as an Attorney, he represented the Estate of one of the alleged victims in this case and indicated to Counsel that he would recuse himself from this cause upon request. A Motion for recusal having been filed by the Defendant, the Court is in agreement and therefore, it is

ORDERED and ADJUDGED that the undersigned does hereby recuse himself and under the regular assignment system, this case is hereby transferred to DIVISION C.

ORDERED at Panama City, Bay County, Florida, this 9th day of July, 1981.

/s/ W. Fred Turner
W. FRED TURNER, CIRCUIT JUDGE

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment, Section 1 to the United States Constitution which, in pertinent part, provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Fl. Rule of Civ. Proc. 3.850 provides, in pertinent part:

> (a) Grounds for Motion. A prisoner in custody under sentence of a court established by the laws of Florida claiming the right to be released on the ground that the judgment was entered or that the sentence was imposed in violation of the Constitution or laws of the United States or of the State of Florida, that the court was without jurisdiction to enter the judgment or to impose the sentence, that the sentence was in excess of the maximum authorized by law, that the plea was given involuntarily, or that the judgment or sentence is otherwise subject to collateral attack may move in the court that entered the judgment or imposed the sentence, to vacate, set aside, or

correct the judgment or sentence.

(b) Time Limitations. A motion to vacate a sentence that exceeds the limits provided by law may be filed at any time. No other motion shall be filed or considered pursuant to this rule if filed more than 2 years after the judgment and sentence become final in a noncapital case or more than 1 year after the judgment and sentence become final in a capital case in which a death sentence has been imposed unless it alleges that

(1) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or,

(2) the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

Florida Rule of Civil Procedure 1.540(h) provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, decree, order or proceeding from the following reasons: . . . (4) the judgment or decree is

void . . . The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, decree, order or proceeding was entered or taken. . . . Writs of coram nobis, coram vobis, audita querela and bills of review and bills in the nature of a bill of review are abolished and the procedure for obtaining any relief from a judgment or decree shall be by motion as prescribed in these rules or by an independent action.

IN THE CIRCUIT COURT, FOURTEENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR BAY COUNTY

STATE OF FLORIDA,

Plaintiff

vs.

CASE NO. 77-708
77-709

WALTER G. STEINHORST,

Defendant.

ORDER DENYING REHEARING AFTER EVIDENTIARY HEARING

THIS CAUSE has come before the Court pursuant to a remand for an evidentiary hearing to determine if the facts on which the movant, Walter G. Steinhorst's, claim to set aside the 3.850 judgment entered by Judge Turner on June 23, 1988 is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence. If this issue is answered in the affirmative, the mandate requires that the 3.850 judgment previously entered should be vacated and a new evidentiary hearing on the 3.850 motion held. The Court has heard the evidence and testimony presented by both the movant and the State and has reviewed the memoranda submitted by counsel and finds the facts on which the movant's claim is predicated could have been ascertained by the exercise of due diligence.

The evidence establishes that the movant and/or the movant's attorney did not know of Judge Turner's recusal, dated July 9, 1981, in the co-defendant case, 77-708. It is clear that Judge Turner did not advise them of this fact and he

did not recuse himself in this defendant's case. Therefore the real issue for determination by this Court is if the fact of Judge Turner's recusal could have been ascertained by the exercise of due diligence of the movant or movant's counsel. The evidence establishes that Judge Turner did not advise counsel of his prior recusal in the Hughes case. However, the evidence also establishes that defense counsel were aware of Judge Turner's "reputation" and as early as November 1, 1986 were actively seeking a way to have him removed from the case. Defense counsel talked to certain members of the local bar about Judge Turner. In this regard, it is important that at no time did defense counsel seek to talk directly by letter, phone or personally to the defense who handled the Hughes case as to what had happened in that case. Instead the evidence on this point is that they "heard" that Hughes defense counsel said he didn't want to cooperate. If contacted defense counsel in the co-defendant's case could have easily advised them of Judge Turner's status in that case. The testimony also establishes that defense counsel and research assistants spent a great deal to time reviewing the contents of the case file contained in the clerk's office in November, 1986 and attempting to obtain information to accomplish their goal of recusing Judge Turner and to assist in filing their 3.850 motion. They now claim that during this review of the files they never saw any copy of Judge Turner's Order of Recusal in the court file.

Prior to 1988, all of the co-defendant's pleadings, etc., were kept in one filing system chronologically without reference to an individual defendant's name. It is apparent that there were numerous pleadings in this court file however there is no basis to find that the relevant records had been misplaced by the Clerk's office in 1986 or thereafter. Although the records were voluminous and complex, defense counsel or staff was never denied access to them. The contents of the files were there for them to review. Furthermore, there is no showing that anyone associated with the Clerk's office attempted to conceal or hide any information from defense counsel or staff. In addition, defense counsel sought no relief

from the Court to make sure that all records were available to it or to correct any perceived problems of access to court records during the course of their review in 1986. They now suggest such a problem existed at the time and that precluded them from discovering Judge Turner's recusal order. The evidence establishes, however that the defense counsel and/or his staff simply overlooked the recusal order contained in the court file during their review. The recusal order was also in the file when it was brought to the evidentiary hearing before Judge Turner in September, 1987. There is no showing that defense counsel re-examined the files immediately prior to or at the evidentiary hearing. It was not until a re-review of the court records in September 1991 that defense counsel staff found the recusal order. The testimony establishes the files in 1991 were in the same shape they were in since the Clerk reorganized them in August of 1988. The reorganization in 1988 consisted simply of rearranging the pleadings chronologically but also by defendant's individual names. Nothing was added or removed. This is verified by the defense counsel staff testimony that they discovered the recusal order while examining the pleading relating to the co-defendant, Hughes.

The Court therefore finds that through due diligence, the Judge's potential conflict, by virtue of his recusal order of July 9, 1981, was reasonably available to defense counsel at the time the 3.850 motion was filed and heard in 1987 and was not misplaced by the Clerk's office. The Court further finds the records of the recusal were ascertainable by the exercise of due diligence prior to the two year time ban of Rule 3.850(b) and is not new evidence. Finally, the Court finds that the information concerning the conflict was reasonably available prior to July 5, 1988, when the defendant filed his Notice of Appeal of the 3.850 judgment and therefore the defendant has waived his right to recuse Judge Turner under F.S. 38.02. Based upon these finds it is therefore

ORDERED AND ADJUDGED that the Defendant, Walter G. Steinhorst's, Motion to Set Aside the Rule 3.850 Judgment entered by Judge Turner be and is hereby denied.

DONE AND ORDERED this 16 day of June 1995 at Panama City, Bay County, Florida.

/s/ Don T. Sirmons
DON T. SIRMONS,
Circuit Judge

State v. Steinhorst

#77-708 709

copies to:
Alton O. Paul, Esq.
ASA

Stephen D. Alexander, Esq.
Defense Counsel

(3)

Supreme Court, U.S.
FILED
NOV 3 1997
CLERK

CASE NO. 97-375

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1997

WALTER GALE STEINHORST, *Petitioner,*

vs.

STATE OF FLORIDA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

BARBARA J. YATES
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 293237

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300

COUNSEL FOR RESPONDENT

2788

"Capital Case"

QUESTION PRESENTED

Steinhorst presents the following questions:

1. Whether one of the most basic fair trial rights granted by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the right to an unbiased and impartial judge, may be unintentionally waived by a criminal defendant, when the defendant is facing a death sentence and is unaware of the facts underlying the waiver?

2. Whether the State may impose an affirmative burden upon Petitioner or his counsel to investigate the background of the Judge who presided over Petitioner's state law collateral attack on his conviction to discover grounds for recusal when (a) Petitioner had no reason to suspect that cause for recusal existed; (b) the Judge failed to properly recuse himself from the case, having previously represented the estate of one of the victims; and (c) the State knew about and failed to disclose the conflict?

The State of Florida restates these questions as follows:

Whether this Court should grant certiorari to review the state courts' factual findings that, under state procedural rules and statutes, Steinhorst waived disqualification of his postconviction judge by failing to find record evidence that was reasonably available to defense counsel.

TABLE OF CONTENTS

QUESTION PRESENTED . . . . . i-ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES . . . . . iv-vii

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND
STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE AND FACTS 2-12

REASONS FOR DENYING THE WRIT

THIS COURT SHOULD DENY CERTIORARI TO REVIEW THE FACTUAL FINDINGS MADE BY THE STATE TRIAL COURT AND AFFIRMED BY THE STATE SUPREME COURT BECAUSE THOSE FINDINGS ARE SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE IN THE RECORD AND WERE CONSTRUED CONSISTENT WITH STATE STATUTES, RULES, AND CASELAW. 12-17

CONCLUSION 17

TABLE OF AUTHORITIES

Federal Cases

Bracy v. Gramley,
117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997) 16

Dugger v. Adams,
489 U.S. 401, 109 S. Ct. 1211,
103 L. Ed. 2d 435 (1989) 16

Herrera v. Collins,
506 U.S. 390, 113 S. Ct. 853,
122 L. Ed. 2d 203 (1993) 16

Sumner v. Mata,
449 U.S. 539, 101 S. Ct. 764,
66 L. Ed. 2d 722 (1981) 16

United States v. Johnston,
268 U.S. 220, 45 S. Ct. 496,
69 L. Ed. 2d 295 (1925) 16

Wainwright v. Sykes,
433 U.S. 72, 97 S. Ct. 2497,
53 L. Ed. 2d 594 (1977) 16

State Cases

Bolender v. State,
658 So. 2d 82 (Fla.),
cert. denied, 116 S. Ct. 12,
132 L. Ed. 2d 896 (1995) 14

Brownlee v. State,
95 Fla. 775, 116 So. 618 (1928) 14

Card v. State,
497 So. 2d 1169 (Fla. 1986) 15

In re Carlton,
378 So. 2d 1212 (Fla. 1978) 14

Data Lease Financial Corp. v.
Blackhawk Heating & Plumbing Co.,
325 So. 2d 475 (Fla. 4th DCA 1975) 14

Dickinson v. Raichl,
120 Fla. 907, 163 So. 217 (1935) 14

Fischer v. Knuck,
497 So. 2d 240 (Fla. 1986) 14

Giuliano v. Wainwright,
416 So. 2d 1180 (Fla. 4th DCA 1982) 14

Lawson v. Longo,
547 So. 2d 1279 (Fla. 3d DCA 1989) 14

Lightbourne v. Dugger,
549 So. 2d 1364 (Fla. 1989) 15

McNealy v. State,
549 So. 2d 248 (Fla. 5th DCA 1989) 15

Oncay v. Oncay,
183 So. 2d 878 (Fla. 3d DCA 1966) 14

In re Paulk,
503 So. 2d 368 (Fla. 1st DCA 1987) 14

Skipper v. State,
114 Fla. 312, 153 So. 853 (1934) 14

State ex rel. Ferrera v. Sandler,
152 Fla. 517, 12 So. 2d 298 (1943) 14

State ex rel. Mizner Land Corp. v. Gray,
117 Fla. 294, 157 So. 663 (1934) 14

State v. King,
426 So. 2d 12 (Fla. 1982) 15

Steinhorst v. State,
412 So. 2d 332 (Fla. 1982) 4

Steinhorst v. State,
498 So. 2d 414 (Fla. 1986) 4,6

Steinhorst v. State,
574 So. 2d 1075 (Fla. 1991) 4

Steinhorst v. State,
636 So. 2d 498 (Fla. 1994) 5,6,7,14

Steinhorst v. State,
695 So. 2d 1245 (Fla. 1997) 1,11,12

White v. State,
664 So. 2d 242 (Fla.),
cert. denied, 116 S. Ct. 591,
133 L. Ed. 2d 505 (1995) 14

Zeigler v. State,
632 So. 2d 48 (Fla. 1993),
cert. denied, 513 U.S. 830,
115 S. Ct. 104, 130 L. Ed. 2d 52 (1994) 15

Federal Statutes

28 U.S.C. §1257(a) 1

28 U.S.C. §2254(d) 16

State Statutes and Rules

Florida Rule of Civil Procedure 1.540 4,5

Florida Rule of Civil Procedure 1.540(h) 2

Florida Rule of Criminal Procedure 3.850 2,4,13

Florida Rule of Criminal Procedure 3.850(b) 10

Florida Rule of Criminal Procedure 3.850(b)(1) 6,14

§38.02, Florida Statutes (1991) 6,10,13

§38.06, Florida Statutes (1991) 5,15

CASE NO. 97-375

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1997

WALTER GALE STEINHORST, *Petitioner,*

vs.

STATE OF FLORIDA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

OPINION BELOW

The opinion of the Florida Supreme Court is reported at 695 So.2d 1245, and a reproduction of the slip opinion is appended to Steinhorst's petition. (Pet. app. at 2-21).[1]

JURISDICTION

Steinhorst seeks jurisdiction pursuant to 28 U.S.C. §1257(a).

---

[1] "Pet. app. at ___" refers to the appendix to Steinhorst's petition for writ of certiorari. For the Court's convenience, the State of Florida will refer to Steinhorst's appendix instead of duplicating documents in the appendix to this response.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Steinhorst relies on the Fourteenth Amendment to the United States Constitution and on Florida Rule of Civil Procedure 1.540(h) and Florida Rule of Criminal Procedure 3.850.

STATEMENT OF THE CASE AND FACTS

The State of Florida does not accept Steinhorst's Statement of the Case because it is argumentative and, for the most part, irrelevant to the issue currently presented to this Court.

The facts that led to Steinhorst's four convictions of first-degree murder and three death sentences are as follows:

> The testimony at trial showed that the appellant was a participant in a marijuana importation conspiracy. In accordance with the smuggling plan he was present on the night of January 23, 1977, near a beach landing site at Sandy Creek in Bay County. Appellant's job was to guard the entrance to a dirt road leading to the beach where the marijuana was to be brought ashore and loaded on trucks.
>
> Two men, Harold Sims and Douglas Hood, and two teenage girls, Sheila McAdams and Sandra McAdams, approached the place where appellant was standing guard. Although there is nothing to explain their presence at that time and place, one reasonable inference is that

they stumbled on the site of the smuggling operation by chance. The testimony indicates that there was then an exchange of fire between Harold Sims and the appellant. Harold Sims was shot and killed. Appellant then took the other three people captive, and confined them in a passenger van.

The testimony of several witnesses shows that appellant then proceeded to consult with several of his co-conspirators. It appears that Douglas Hood and the two McAdams girls were held captive for several hours while appellant and the leaders of the group decided what to do with them. Meanwhile, the landing and loading of marijuana proceeded almost until morning.

Bobby Joe Vines, the organizer of the smuggling scheme, testified that after the shooting of Harold Sims, appellant asked that his friend Charles Hughes be brought to him. Hughes was summoned from the landing site where he was bringing marijuana ashore. There was testimony from which the jury could infer that when Vines and the other men left the area with their loads of marijuana, appellant and Hughes departed with a human cargo of one dead and three living persons.

Several months later divers discovered the bodies of the victims in a sinkhole in Taylor County. The evidence showed that all four victims had been shot to death. The bodies were weighted down with concrete blocks.

Steinhorst v. State, 412 So.2d 332, 334-335 (Fla. 1982).

By special assignment of the Chief Justice, James C. Adkins, Jr., a sitting Justice of the Florida Supreme Court, conducted Steinhorst's trial in 1978.[2] When Steinhorst filed his first motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850 in 1986, the case came before circuit judge W. Fred Turner. Judge Turner summarily denied the motion, and the Florida Supreme Court directed that an evidentiary hearing be held. Steinhorst v. State, 498 So.2d 414 (Fla. 1986). After that hearing, the court affirmed the circuit court's denial of relief. Steinhorst v. State, 574 So.2d 1075 (Fla. 1991).

In 1991 Steinhorst filed a second postconviction motion, seeking relief based on Florida Rule of Civil Procedure 1.540. That motion alleged that Judge Turner should not have heard the original postconviction motion because, before becoming a circuit judge, Turner represented the estate of Harold Sims, one of Steinhorst's victims. (Pet. app. at 192). Steinhorst also alleged that in 1981 Judge Turner recused himself from the trial of Charlie Hughes, one of Steinhorst's codefendants, based on his connection with Sims' estate. (Pet. app. at 203). Judge Don T. Sirmons heard the second motion and denied relief because

> rule 1.540 is not the proper method to collaterally attack a criminal judgment and sentence under Florida law; a rule 3.850 motion would be untimely and successive; no merit to the claim that Judge Turner should have recused

---

[2] The allegations concerning Justice Adkins' feelings about Steinhorst's trial (petition at 5 n.3) are irrevelant to these proceedings. Justice Adkins' affidavit has never been accepted by any court.

> himself from consideration of Steinhorst's 3.850 motion; and orders entered by judges subject to disqualification are not void and are not subject to collateral attack.

(Pet. app. at 137; Steinhorst v. State, 636 So.2d 498, 500 (Fla. 1994); see also pet. app. at 181-83).

On appeal, the Florida Supreme Court agreed with Judge Sirmons that rule 1.540 did not apply. (Pet. app. at 137; Steinhorst, 636 So.2d at 500). That court noted that "no such recusal was ordered [in Steinhorst's case], nor did the judge notify the parties of the potential conflict, even though the reasons for recusal applied equally to both cases." (Pet. app. at 138; Steinhorst, 636 So.2d at 500). The court then set out the positions of the parties on appeal:

> The State calls our attention to the fact that section 38.06, Florida Statutes (1991), appears to render "valid" any order entered by an otherwise-recusable judge when a party has failed to file a timely suggestion of disqualification. Here, the defense did in fact fail to file such a motion in the proceeding in question. However, the defense contends that the failure to determine the trial court's potential conflict occurred in part because the relevant records had been misplaced by the office of the court clerk below. We have no way of knowing if this contention is true, because the trial court below conducted no evidentiary hearing.

(Pet. app. at 138; Steinhorst, 636 So.2d at 500).

Based on applicable state law,[3] the court stated: "If the information regarding the judge's potential conflict was reasonably available and Steinhorst did not move to recuse the judge, then the right to recuse the judge was waived. See Sec. 38.02, Fla.Stat. (1991) (suggestion of disqualification must be filed within thirty days after party or attorney learns of ground for disqualification or ground considered waived)." (Pet. app. at 138; Steinhorst, 636 So.2d at 500). The court then went on to state that, "if the relevant records were not reasonably available to Steinhorst and the conflict could not be ascertained by the exercise of due diligence, then the prior recusal would constitute newly-discovered evidence properly cognizable in a 3.850 motion." (Pet. app. at 138; Steinhorst, 636 So.2d at 500). The court reached this conclusion because of due process concerns "that proceedings involving criminal charges, and especially the death penalty, must both be and appear to be fundamentally fair." (Pet. app. at 138; Steinhorst, 636 So.2d at 501). Thereafter, the court held that an evidentiary hearing should be held and stated that

> if the trial court determines that the "facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence," Fla.R.Crim.P. 3 850(b)(1), then it should grant the motion for postconviction relief, vacate the 3.850 judgment entered by Judge Turner, and conduct a new evidentiary proceeding pursuant to rule 3.850 and this Court's opinion in Steinhorst, 498 So.2d at 414-15.

---

[3] Sections 38.02 and 38.06, Florida Statutes (1991), attached to this response as appendices A and B.

(Pet. app. at 139; Steinhorst, 636 So.2d at 501).

Judge Sirmons held the evidentiary hearing in October 1994. In his order denying relief, Judge Sirmons stated the issue as 'if the fact of Judge Turner's recusal could have been ascertained by the exercise of due diligent of the movant or movant's counsel." (Pet. app. at 208). The judge reviewed Steinhorst's evidence and stated:

> The evidence establishes that Judge Turner did not advise counsel of his prior recusal in the Hughes case. However, the evidence also establishes that defense counsel were aware of Judge Turner's "reputation" and as early as November 1, 1986 were actively seeking a way to have him removed from the case. Defense counsel talked to certain members of the local bar about Judge Turner. In this regard, it is important that at no time did defense counsel seek to talk directly by letter, phone or personally to the defense counsel who handled the Hughes case as to what had happened in that case. Instead the evidence on this point is that they "heard" that Hughes defense counsel said he didn't want to cooperate. If contacted defense counsel in the co-defendant's case could have easily advised them of Judge Turner's status in that case. The testimony also establishes that defense counsel and research assistants spent a great deal of time reviewing the contents of the case file contained in the clerk's office in November, 1986 and attempting to obtain information to accomplish their goal of recusing Judge Turner and to assist in filing their 3.850 motion. They now claim that during

this review of the files they never saw any copy of Judge Turner's Order of Recusal in the court file.

(Pet. app. at 208).

The court then turned to the state's evidence and stated:

> Prior to 1988, all of the co-defendant's pleadings, etc., were kept in one filing system chronologically without reference to an individual defendant's name. It is apparent that there were numerous pleadings in this court file however there is no basis to find that the relevant records had been misplaced by the Clerk's office in 1986 or thereafter. Although the records were voluminous and complex, defense counsel or staff was never denied access to them. The contents of the files were there for them to review. Furthermore, there is no showing that anyone associated with the Clerk's office attempted to conceal or hide any information from defense counsel or staff. In addition, defense counsel sought no relief from the Court to make sure that all records were available to it or to correct any perceived problems of access to court records during the course of their review in 1986.

(Pet. app. at 208-09).

Responding to Steinhorst's suggestion that the files were actively concealed, the court stated:

> They now suggest such a problem existed at the time and that precluded them from discovering Judge Turner's recusal order. The evidence establishes, however, that the defense counsel and/or his staff simply overlooked the recusal order contained in the court file during their review. The recusal order was also in the file when it was brought to the evidentiary hearing before Judge Turner in September, 1987. There is no showing that defense counsel re-examined the files immediately prior to or at the evidentiary hearing. It was not until a re-review of the court records in September, 1991 that defense counsel staff found the recusal order. The testimony establishes the files in 1991 were in the same shape they were in since the Clerk reorganized them in August of 1988. The reorganization in 1988 consisted simply of rearranging the pleadings chronologically but also by defendant's individual names. Nothing was added or removed. This is verified by the defense counsel staff testimony that they discovered the recusal order while examining the pleadings relating to the co-defendant, Hughes.

(Pet. app. at 209).

Judge Sirmons then made the following findings of fact based on the evidence presented at the evidentiary hearing:

> The Court therefore finds that through due diligence, the Judge's potential conflict, by virtue of his recusal order of July 9, 1981, was reasonably available to defense counsel at the

> time the 3.850 motion was filed and heard in 1987 and was not misplaced by the Clerk's office. The Court further finds the records of the recusal were ascertainable by the exercise of due diligence prior to the two year time ban of Rule 3.850(b) and is not new evidence. Finally, the Court finds that the information concerning the conflict was reasonably available prior to July 5, 1988, when the defendant filed his Notice of Appeal of the 3.850 judgment and therefore the defendant has waived his right to recuse Judge Turner under F.S. 38.02.

(Pet. app. at 209). Based on these findings, the circuit court denied Steinhorst's second motion for postconviction relief. (Pet. app. at 210).

On appeal, Steinhorst argued that the evidence did not support Judge Sirmons' findings. The Florida Supreme Court set out Steinhorst's argument and then stated:

> However, there was also evidence presented suggesting a different explanation for why the Hughes recusal order may have come from the basement vault in 1991. State witness Gloria Tharpe, an employee of the clerk's office, testified that before 1988, all of the paperwork regarding Steinhorst and his codefendants, known as the Sandy Creek files, was kept together in a roughly chronological but otherwise unorganized fashion. She testified that these files were kept in a file room on the first floor next to the clerk's office. Tharpe further testified that in 1988, when it became necessary to prepare the record on appeal for

> Steinhorst's first 3.850 motion, she reorganized the Sandy Creek files by separating the paperwork according to individual defendant.
>
> Reena Goss Baker corroborated Tharpe's testimony regarding the location of the Sandy Creek files. She testified that between 1985 and 1988, all the pleadings, motions, and orders for all the Sandy Creek defendants were kept on the first floor near the clerk's office. She further testified that only the State's exhibits were kept in the inaccessible basement vault during this time. It was only after the files were organized by individual defendant in 1988 that the files on inactive Sandy Creek defendants were placed in the basement vault.

(Pet. app. at 6-7; Steinhorst v. State, 695 So.2d 1245, 1248 (Fla. 1997), footnote omitted). The court then set out its duty in reviewing evidentiary rulings: "When the evidence adequately supports two conflicting theories, this Court's duty is to review the record in the light most favorable to the prevailing theory." (Pet. app. at 7; Steinhorst, 695 So.2d at 1248). In applying that standard, the court stated that it would "not alter a trial court's factual findings if the record contains competent substantial evidence to support those findings." (Pet. app. at 7; Steinhorst, 695 So.2d at 1248). The court reviewed the evidence and concluded "that the evidence in the record supports the trial court's finding that in 1986, when Steinhorst's attorneys were preparing for the first 3.850 evidentiary hearing, the Hughes' recusal order was in the same court file that contained Steinhorst's paperwork" and found that "the record contains competent substantial evidence to support the trial court's finding that "at no time did defense counsel seek to talk directly or by letter, phone or personally to the

defense counsel who handled the Hughes case as to what happened in that case." (Pet. app. at 7; Steinhorst, 695 So.2d at 1248). The Florida Supreme Court affirmed the circuit court's denial of relief, stating: "Having upheld the trial court's findings of fact, we conclude that the trial court did not err in denying Steinhorst's motion for relief. (Pet. app. at 9; Steinhorst, 695 So.2d at 1249).

REASONS FOR DENYING THE WRIT

THIS COURT SHOULD DENY CERTIORARI TO REVIEW THE FACTUAL FINDINGS MADE BY THE STATE TRIAL COURT AND AFFIRMED BY THE STATE SUPREME COURT BECAUSE THOSE FINDINGS ARE SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE IN THE RECORD AND WERE CONSTRUED CONSISTENT WITH STATE STATUTES, RULES, AND CASELAW.

Steinhorst makes two arguments in his petition. First, he argues that, because a defendant has the right to be tried before an impartial tribunal, any waiver of that right should be knowing and intelligent and cannot be presumed. Second, he argues that the due diligence requirement in Florida Rule of Criminal Procedure 3.850 for newly discovered evidence claims places an undue burden on a postconviction movant. In reality, however, Steinhorst is asking this Court to review the factual findings made and affirmed by the state courts because he disagrees with the state courts' conclusion that his postconviction claim of newly discovered evidence (Judge Turner's recusal from the Hughes' trial) was procedurally barred due to lack of due diligence.

In denying Steinhorst relief, the state courts relied on section 38.02, Florida Statutes (1991), which provides in part:

> In any cause in any of the courts of this state any party . . . may . . . show by a suggestion filed in the cause that the judge before whom the cause is pending . . . is interested in the result thereof . . . . Such suggestion shall be filed in

> the cause within 30 days after the party filing the suggestion, or his attorney, or attorneys, of record, or either of them, learned of such disqualification, otherwise the ground, or grounds, of disqualification shall be taken and considered as waived.

(App. A1). The courts of Florida, pursuant to statute, have long held that one must seek disqualification of a judge in a timely manner or the grounds for disqualification will be waived. In re Carlton, 378 So.2d 1212 (Fla. 1978); State ex rel. Ferrera v. Sandler, 152 Fla. 517, 12 So.2d 298 (1943); Dickinson v. Raichl, 120 Fla. 907, 163 So. 217 (1935); State ex rel. Mizner Land Corp. v. Gray, 117 Fla. 294, 157 So. 663 (1934); Skipper v. State, 114 Fla. 312, 153 So. 853 (1934); Giuliano v. Wainwright, 416 So.2d 1180 (Fla. 4th DCA 1982); see Brownlee v. State, 95 Fla. 775, 116 So. 618 (1928); see also Fischer v. Knuck, 497 So.2d 240 (Fla. 1986); Lawson v. Longo, 547 So.2d 1279 (Fla. 3d DCA 1989); In re Paulk, 503 So.2d 368 (Fla. 1st DCA 1987); Data Lease Financial Corp. v. Blackhawk Heating & Plumbing Co., 325 So.2d 475 (Fla. 4th DCA 1975); Oncay v. Oncay, 183 So.2d 878 (Fla. 3d DCA 1966).

The state courts also relied on Florida Rule of Criminal Procedure 3.850(b)(1) which provides that a postconviction motion may be brought outside the time limits of rule 3.850 if the "'facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence.'" (Pet. app. at 139; Steinhorst, 636 So.2d at 501). The state courts have consistently found claims of newly discovered evidence procedurally barred when not made in a timely manner. White v. State, 664 So.2d 242 (Fla.), cert. denied, 116 S.Ct. 591, 133 L.Ed.2d 505 (1995); Bolender v. State, 658 So.2d 82 (Fla.),

cert. denied, 116 S.Ct. 12, 132 L.Ed.2d 896 (1995); Zeigler v. State, 632 So.2d 48 (Fla. 1993), cert. denied, 513 U.S. 830, 115 S.Ct. 104, 130 L.Ed.2d 52 (1994); Lightbourne v. Dugger, 549 So.2d 1364 (Fla. 1989). Lightbourne is close to the instant case factually, but involved an attempt to disqualify a trial judge rather than a postconviction judge. Lightbourne's judge had represented the victim's father while in private practice and told the parties that prior to Lightbourne's 1981 trial. The state courts found his disqualification claim procedurally barred because Lightbourne had access to the facts necessary to making the claim earlier but did not raise it until 1989. Lightbourne, 549 So.2d at 1365-66.

Steinhorst argues that certiorari should be granted because "[t]he Florida Supreme Court agreed that Petitioner had established Judge Turner's blatant conflict of interest and the resulting violation of his fundamental constitutional right to an impartial tribunal." (Petition at 28). This extraordinary statement ignores the conditional nature of the court's directive - a new evidentiary hearing should be held on Steinhorst's first postconviction motion if Judge Turner's recusal from the Hughes' trial could not have been discovered prior to 1991 through the exercise of due diligence. Steinhorst's entire argument ignores the converse of the court's pronouncement, *i.e.*, if Judge Sirmons did not find that due diligence had been exercised, Judge Turner's ruling on the original motion should not be disturbed.[4] Judge Sirmons found, however, and the Florida Supreme Court agreed that Steinhorst had not exercised due diligence and that, therefore, his claim was procedurally barred.

---

[4] If a suggestion of disqualification is not timely filed, a judge's orders, judgments, and decrees are valid. §38.06, Fla.Stat. (1991) (App. B1). See Card v. State, 497 So.2d 1169 (Fla. 1986); State v. King, 426 So.2d 12 (Fla. 1982); McNealy v. State, 549 So.2d 248 (Fla. 5th DCA 1989).

In Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981), this Court considered 28 U.S.C. §2254(d), which provides that state court factual findings made after an evidentiary hearing shall be deemed correct. Steinhorst claims that the state proceedings violated his due process rights, but has failed to support that claim. Instead, the state courts followed well-established precedent in finding Steinhorst's claim procedurally barred and treated him no differently than any other litigant. Accepting Steinhorst's argument would undo this Court's repeated affirmance of state procedural bars. E.g., Dugger v. Adams, 489 U.S. 401, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989); Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

Steinhorst argues that the facts do not support the state courts' rulings, but this Court has long held that it does "not grant certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227, 45 S.Ct. 496, 497, 69 L.Ed.2d 295 (1925); Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). Moreover, "[f]ederal courts are not forums in which to relitigate state trials." Herrera, 506 U.S. at 401, 113 S.Ct. at 861, 122 L.Ed.2d at 217 (quoting Barefoot v. Estelle, 463 U.S. 880, 887, 103 S.Ct. 3338, 3391, 77 L.Ed.2d 1090 (1983)). Relitigation of his state proceedings, however, is precisely what Steinhorst is seeking. None of the cases that Steinhorst cites is factually comparable to his case. Bracy v. Gramley, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997), and the other cases are distinguishable because they deal with timely, not untimely, raised claims and because they are concerned with the defendants' trials, not postconviction proceedings. Bracy, moreover, which involved a judge convicted of taking bribes, presents a most egregious situation, one that strikes at the very basis of our legal system and is in no way similar to Judge Turner's situation. Review by this Court would only confirm that, as well as the fact that the state

courts fully considered the issue presented here and decided it correctly.

CONCLUSION

Therefore, the State of Florida asks this Court to deny the petition for writ of certiorari.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

BARBARA J. YATES
Assistant Attorney General
Florida Bar No. 293237

OFFICE OF ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300

COUNSEL FOR RESPONDENT

CASE NO. 97-375

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1997

WALTER GALE STEINHORST, *Petitioner,*

vs.

STATE OF FLORIDA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

INDEX TO APPENDIX

1. Section 38.02, Florida Statutes (1991).....[A1]

2. Section 38.06, Florida Statutes (1991).....[B1]

38.02 Suggestion of disqualification; grounds; proceedings on suggestion and effect - In any cause in any the courts of this state any party to said cause, or any person or corporation interested in the subject matter of such litigation, may at any time before final judgment, if the case be one at law, and at any time before final decree, if the case be one in chancery, show by a suggestion filed in the cause that the judge before whom the cause is pending, or some person related to said judge by consanguinity or affinity within the third degree, is a party thereto, or is interested in the result thereof, or that said judge is related to an attorney or counselor of record in said cause by consanguinity or affinity within the third degree, or that said judge is a material witness for or against one of the parties to said cause, but such an order shall not be subject to collateral attack. Such suggestions shall be filed in the cause within 30 days after the party filing the suggestion, or his attorney, or attorneys, of record, or either of them, learned of such disqualification, otherwise the ground, or grounds, of disqualification shall be taken and considered as waived. If the truth of any suggestion does not appear from the record in said cause, the judge may by order entered therein require the filing in the cause of affidavits touching the truth or falsity of such suggestion. If the judge finds that the suggestion is true, he shall forthwith enter an order reciting the ground of his disqualification and declaring himself disqualified in the cause; if he finds that the suggestion is false, he shall forthwith enter his order so reciting and declaring himself to be qualified in the cause. Any such order declaring a judge to be disqualified shall not be subject to collateral attack nor shall it be subject to review. Any such order declaring a judge qualified shall not be subject to collateral attack but shall be subject to review by the court having appellate jurisdiction of the cause in connection with which the order was entered.

38.06 Effects of acts where judge fails to disqualify himself - In any cause where the grounds for a suggestion of disqualification, as set forth in s. 38.02, appear of record in the cause, but no suggestion of disqualification is filed therein, the orders, judgments and decrees entered therein by the judge shall be valid. Where, on a suggestion of disqualification the judge enters an order declaring himself qualified, the orders, judgments and decrees entered therein by the said judge shall not be void and shall not be subject to collateral attack.